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REPORTS

OF

THE DECISIONS

OF THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

NOT HERETOFORE REPORTED UNDER OFFICIAL SANCTION.

ARRANGED ALPHABETICALLY,

WITH NOTES,

AND

REFERENCES TO SUBSEQUENT DECISIONS AND LEGISLATION.

EDITED BY

AUSTIN ABBOTT.

VOL. II.

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DECISIONS

OF THE

COURT OF APPEALS.

EARL *v.* CLUTE.

December, 1864.

To avoid a mortgage on the ground that it was given to compound a felony, it should appear, 1. That there was an agreement to compound a felony; 2. That the mortgage was the result of that agreement; and, 3. That the mortgagee knew of the illegal consideration, at the time of taking the mortgage.*

Evidence that the mortgagee had admitted having knowledge of the illegal consideration after he took the mortgage, is not competent, as against an assignee of the mortgage.†

---

* Compare Conderman *v.* Hicks, 3 *Lans.* 108; S. C., as Conderman *v.* Trenchard, 58 *Barb.* 165; S. C., 40 *How. Pr.*, 71; Porter *v.* Havens, 37 *Barb.*, 343.

† For the application and limitations of the rule settled in the leading case of Page *v.* Cagwin, referred to on this point in the opinion, see Worrall *v.* Parmalee, 1 *N. Y.* (1 *Comst.*) 519; Booth *v.* Swezey, 8 *N. Y.* (4 *Seld.*) 276; Brown *v.* Mailler, 12 *N. Y.* (2 *Kern.*) 118; Tousley *v.* Barry, 16 *N. Y.* 497; Foster *v.* Beals, 21 *N. Y.* 247; Gandolfo *v.* Appleton, 40 *Id.* 533; Beach *v.* Wise, 1 *Hill*, 612; Christie *v.* Bishop, 1 *Barb. Ch.* 105; Jermain *v.* Worth, 5 *Den.* 342; Ely *v.* Kilborn, 5 *Den.* 514; Brisbane *v.* Pratt, 4 *Den.* 65; Smith *v.* Webb, 1 *Barb.* 230; Bort *v.* Smith, 5 *Id.* 283; Allen *v.* Way, 7 *Id.* 585; Westlake *v.* St. Lawrence Co. Ins. Co., 14 *Id.* 206; Seeley *v.* Engell, 17 *Id.* 530; Smith *v.* Schanck, 18 *Id.* 344; Jones *v.* East Soc. M. E. Ch., 21 *Id.* 161; Burlingame *v.* Robbins, 21 *Id.* 327; Schenck *v.* Warner, 37 *Id.* 258; Osborn *v.* Robbins, 37 *Id.* 481; Peck *v.*

Earl v. Clute.

James Earl sued Derrick Clute, Jr., in the supreme court, to recover the possession of a horse.

The defendant set up that the plaintiff had given a chattel mortgage on the horse to one Van Hyning and others, who had assigned the mortgage to Thomas J. Clute. That the plaintiff had failed to make the payments required by the mortgage, and that thereupon Thomas J. Clute, by virtue of a power contained in the mortgage, had taken possession of the horse and sold him to the defendant. On the trial, the plaintiff, to avoid the mortgage, adduced evidence to show that it had been made to secure the mortgagees against liability on a note given by them to one McCarty, to compound a criminal charge of perjury against James Emmet Earl, son of the plaintiff.

It was shown that the plaintiff had recovered a judgment against McCarty for fifty dollars, in an action in which the son of the present plaintiff was a witness; and that immediately afterwards McCarty caused the arrest of the son of the plaintiff on a charge of perjury in his testimony. That thereupon the plaintiff had made the mortgage in question for the amount of the judgment and costs, to Van Hyning and the others, on condition that they should make a note for a like amount to McCarty, the purpose being, as the plaintiff now alleged, to compound the criminal charge.

The evidence showed that the parties were all together after the arrest of plaintiff's son, and were advised by McCarty's lawyer that they could not settle a criminal prosecution. The defendants advanced to Earl some money—about ten dollars—which was included in the mortgage, with which Earl paid the costs of the prosecution. One of the mortgagees, Close, called as a witness for plaintiff, testified that he was asked by Emmet Earl to sign a note in favor of McCarty, and that on being asked by witness if the object was to settle the crimminal charge, Emmett Earl replied, No. Culver (the attorney) says it can't be settled; but that he owed McCarty for a judgment against him, and Culver says that I have a right to pay that back.

The note and the mortgage were then executed together, and

Crouse, 46 *Id.* 151; Johnson *v.* Hicks, 1 *Lans.* 150; Bullis *v.* Montgomery, 3 *Lans.* 255; and see Jermain *v.* Denniston, 6 *N. Y.* (2 *Seld.*) 276; Gardner *v.* Barden, 34 *N. Y.* 433.

the money handed to the constable, and after that the matter was dropped. The witness Close testified that he had no expectation or thought as to whether the prosecution would be stopped by the giving of the note.

Other evidence, excluded under exception, is sufficiently stated in the opinion.

At the close of the evidence a motion to nonsuit the plaintiff was granted. In another action arising out of the same facts, the supreme court had treated the mortgage as void. Fellows *v.* Van Hyring, 23 *How. Pr.* 230.

Judgment for defendant was given in the present action.

The supreme court, at general term, affirmed the judgment, the following opinion being rendered:

BY THE COURT.—HOGEBOOM, J.—The plaintiff offered to prove by William B. Harris, that one Fellows stated to Van Hyning (one of the mortgagees) before the assignment of the mortgage to Clute, that he had a mortgage upon the property in question, and asked Van Hyning if he did not know that the mortgage in question was given to settle and drop the criminal prosecution against James Emmett Earl; to which he replied he did. This evidence was objected to by defendant's counsel as not competent in this action, and the objection was sustained by the court, and the evidence excluded. To which the plaintiff's counsel duly excepted.

This exception is not well taken. In the first place, it was not material to this issue, whether Fellows had a mortgage upon the property in question; and as this evidence was properly excluded, the whole exception, being general, must fail. Again, as to the residue of the evidence, the offer was to show an *admission* by one of the mortgagees, that before he had made the assignment to Clute,—not before he took the mortgage,—he knew it was given to settle a criminal prosecution. Knowledge acquired at so late a period could not invalidate the mortgage. Besides, Van Hyning himself was a competent witness, and his admissions improper testimony. The true question was, whether the mortgage was *in fact* given for an illegal consideration; not whether he had said so. *Paige* v. *Cagwin*, *7 Hill*, 361.

The motion for a nonsuit was also properly disposed of. There was no sufficient evidence that there was any agreement to compound a felony; still less, that the mortgage was the result of such an agreement to compound a felony; still less, that the mortgagees had knowledge that the note which the mortgage was given to secure, was tainted by such an illegal purpose. All which were essential to make the mortgage invalid, even as against them.

The evidence was insufficient to warrant a verdict for the plaintiff, or to be submitted to the jury for that purpose.

The judgment of the circuit court should be affirmed.

The plaintiff appealed to this court.

John K. Porter, for plaintiff, appellant;—That the mortgage was void, cited, 3 *R. S.* 5 ed. 969, § 18; Perkins *v.* Savage, 15 *Wend.* 412, 416; DeGroot *v.* Vanduser, 20 *Id.* 395; Peck *v.* Briggs, 3 *Den.* 107; Loomis *v.* Cline, 4 *Barb.* 453; Gray *v.* Hook, 4 *N. Y.* 449; Dewitt *v.* Brisbane, 16 *Id.* 508. The mortgagees had knowledge. Tracy *v.* Talmage, 14 *N. Y.* 162, 175. The intent is proved by circumstances. Van Neste *v.* Conover, 20 *Barb.* 547; People *v.* McCann, 15 *How. Pr.* 521. That the case should have been submitted to the jury, the defense to the note being perfect. *Story on Contr.* § 569, 575; *Chitty on Contr.* 570, 582; Bush *v.* Lathrop, 22 *N. Y.* 535. The admission of one of the conspirators was competent. Moers *v.* Morro, 29 *Barb.* 361; Cuyler *v.* McCartney,* 33 *Id.* 165.

T. J. Clute, for defendant, respondent;—Cited 5 *How. Pr.* 425; Tracy *v.* Talmage, 14 *N. Y.* 162.

THE COURT affirmed the judgment, for the reasons assigned in the foregoing opinion of HOGEBOOM, J., a majority of the judges adopting the same.

Judgment affirmed, with costs.

* This decision was reversed in 40 *N. Y.* 221.

EATON *v.* ALGER.*

A receipt for a note, with the words, "which I agree to account for on demand," is not a contract of bailment, nor within the rule which excludes parol testimony to vary a writing, but is explainable as a receipt, especially by third persons.

A charge, in addition to interest, for trouble and expense incurred by the lender in procuring the money to loan, is not necessarily usury.

Josiah Eaton (for whom, on his death, Abigail W. Eaton and others, administratrix, &c., were substituted) sued John P. Alger and Wilkes T. Alger, in September, 1858, upon a promissory note made by the former, and indorsed by the latter defendant, and payable to Ira M. Clark, or bearer; which note, the plaintiff alleged, was assigned by said Clark to him, previous to the commencement of this action.

Upon the defense that, 1. The note was usurious; and, 2. The plaintiff was not the real party in interest, the plaintiff was nonsuited. The court at general term affirmed this judgment, and plaintiff appealed.

E. Cowen, for plaintiffs, appellants.

A. Pond, for defendants, respondents.

BY THE COURT.—WRIGHT, J.—The plaintiff's intestate was nonsuited on the ground that his own evidence established that he was not the owner of the note, and, also, that the note was void for usury. The supreme court, at general term, only considered the question of title to the note, and the exceptions to the rejection of evidence on that point, and, arriving at the conclusion that the nonsuit was sustainable on the ground that the plaintiff had affirmatively shown title out of himself, omitted considering the further question whether he had, also, as was held at the circuit, shown that the note was usurious.

---

* The decision in this case was re-affirmed by this court, on another appeal, in 47 *N. Y.* 345; affirming 57 *Barb.* 179.

On the point stated in the first head-note above, compare Seymour *v.* Cowing, in this series, and McDougall *v.* Cooper, 31 *N. Y.* 498; Hotchkiss *v.* Mosher, 48 *N. Y.* 478.

On that in the second head-note, see Lee *v.* Chadsey, in this series, and Bell *v.* Day, 32 *N. Y.* 165.

I think that the nonsuit cannot be sustained on either ground; and that the rulings of the judge, in rejecting evidence of the plaintiff's ownership of the paper, on the assumption that the instrument, in the nature of a receipt, expressed the whole contract of transfer to the plaintiff, which was a contract of bailment, simply, and that in an action against the defendants on the note, the plaintiff was estopped from showing an actual sale and delivery of it to him upon a valuable and full consideration,—were erroneous.

1. The note was payable to bearer, and transferable by mere delivery. The plaintiff was in possession of it, and produced it on the trial. This was sufficient evidence of his title; and if it were any defense, to be urged by the defendants, that some person other than the holder was the real owner, the *onus* was on them of establishing it. Indeed, I cannot see how the defendants could, for such reason, defeat the action, except, possibly, on the ground that every action must now be prosecuted in the name of the real party in interest; and then, the objection should have been distinctly taken by demurrer or answer. It seems to me no defense to the maker of a negotiable promissory note, transferable by mere delivery, that, as between the holder and a former owner, there has not been, in judgment of law, an effectual transfer of the paper. But let this pass. Here, after excluding all affirmative evidence offered by the holder to show title in himself, and adroitly foisting into the case a receipt given by him at the time of the alleged transfer, which is held to be the whole contract, in relation thereto, and that, a contract of bailment, not to be explained or contradicted by parol, the holder is nonsuited, for the reason that it appears by his own evidence that he was not the real owner. Clark, the original payee, who was called by the plaintiff to disprove the allegations of usury, on cross-examination was asked whether, at the time he transferred the note to the plaintiff, he took back any writing with regard to it, whereupon he answered in the affirmative. Subsequently, when interrogated unnecessarily by the plaintiff's counsel, as to the terms of the transfer, the question was objected to, on the ground that the transaction was in writing, and the objection sustained. I am inclined to think that this ruling was incorrect. It was, so far as the defendants

were concerned, entirely a collateral matter. The witness then testified: "This paper" (showing it) "is the receipt I took upon that occasion;" at the same time stating that the paper did not contain all the terms of the agreement of transfer. The writing was produced, and was of this purport:

"Received of Ira M. Clark, a note against J. P. Alger, indorsed by W. S. Alger, for six hundred and twenty-nine dollars and seventy-five cents, which I agree to account for on demand. JOSIAH EATON."

The paper being thus in evidence, the question, "What was the contract of sale of the note, if any?" was excluded, on objection of the defendant, that the receipt contained the whole contract, and parol evidence was not admissible to add to or explain it; and also an offer to show that, at the time the receipt was executed, the witness sold and delivered the note to the plaintiff upon a valuable and full consideration, was rejected under like objection, and for like reasons. Having thus succeeded in excluding all affirmative proof of ownership of the note, on the part of the plaintiff, which was quite unnecessary, unless the writing called a receipt conclusively showed title out of him, he is nonsuited on the ground that it appeared, by his own evidence, that he was not the true owner.

These rulings, and the result attained thereby, seem to me clearly erroneous. If it be true, as it is not, that the plaintiff was estopped from showing a sale and delivery of the note to him for a valuable consideration, the receipt did not furnish conclusive evidence that the title was not in him. He was the holder and presumptive owner, and the evidence furnished by the paper did not conclusively overcome that presumption. It is not pretended that it did, unless it is, upon its face, a complete and perfect contract of bailment. In the court below, two of the judges held it to be that, and nothing else, whilst another was equally positive that it imported a contract of sale. The truth is, that it is not a complete agreement of either description. It is an acknowledgment by the plaintiff of the receipt of the note from Clark, and a further acknowledgment of liability for it, but the paper is wholly silent as to the kind of

liability imposed upon the plaintiff by its execution. It is certainly not, on its face, a contract of bailment. It contains no acknowledgment of any title in Clark, no agreement to redeliver the note, and no statement of any use to be made of it by the plaintiff, or of any duty to be performed by him in regard to it. There is no express promise to return the identical note to Clark, nor can any such promise be implied from its language. If the receipt be a contract of bailment, I imagine it would be quite difficult to assign it a place among the five species or classes of bailments known to the law; and if not a complete contract of that description, it furnished no evidence, conclusive or inconclusive, that the title to the note was not in the plaintiff.

But again, after the judge had ruled that the receipt imported a bailment, it was offered to be proved, by the testimony of both of the parties to it, that they made a contract of sale, and that the note was delivered to the plaintiff in pursuance thereof; and, further, that, if the receipt imported a bailment, it failed to express the true agreement between the parties. This proof, on objection of the defendants, was excluded, on the ground that the paper contained the whole contract of transfer, and parol evidence was inadmissible to add to or explain it; and also that the action was not one to reform the instrument on the ground of mistake. This ruling cannot be legally sustained. The defendants were entire strangers to the receipt, claiming nothing under it, and having no interest in the note, the subject matter of it. Their rights could not be affected, in the slightest degree, by the alleged transfer, for a payment of the note to the plaintiff would be just as beneficial to them as a payment to Clark. Both Clark and the plaintiff agreed that the true contract was a sale of the note, and both, also, agreed that the written contract, if rightly construed by the court, was not the true one; yet, at the instance of the defendants, who were strangers to the transaction, they are held to an agreement which they both say that they did not intend to make. There was no question as to reforming the contract, for the only parties interested in it were agreed as to its nature; and, if it was a mutual mistake, and they could correct it at all, they could do it at the trial. Evidence was offered for that purpose, and re-

jected. It is not the law that, if parties execute an instrument by mistake, which does not express the contract between them, they are bound by that mistake, as to third persons, until it is actually corrected. But, further, the plaintiff was not estopped by the receipt from showing, by parol, the real agreement of transfer. The general rule is that estoppels are mutual. Parties to an instrument are mutually precluded from varying it by parol; but the rule does not apply to persons who are neither parties nor privies to the contract, and whose rights are not affected thereby. It cannot be doubted that, if the rights of the defendants were injuriously affected by the receipt, they could contradict it by parol; and, therefore, the parties to the receipt are not estopped as to them, and, in an action with them, may show the real agreement by parol.

2. It was equally an error to have nonsuited the plaintiff on the ground that he had, himself, proved that the note was usurious and void. The note in suit was given in renewal of one for six hundred dollars, made in July, 1857, by one Samuel Burpee and John P. Alger, and payable to Ira M. Clark, or bearer. The circumstances under which the last mentioned note was given, as the plaintiff showed by two witnesses, were these: In July, 1857, Clark (who resided at Newport, in the State of Hampshire, but was temporarily staying at Saratoga Springs) was applied to by Burpee, at the Springs, to lend him six hundred dollars, which he stated he wanted to pay a note he was then owing at the savings bank, Springfield, Vermont. The security he proposed was satisfactory, but Clark informed him that he had not the money with him; that it was at Newport, in the bank, and that it would be attended with considerable trouble and expense to go after it. Burpee inquired as to the probable expense, and was told twenty-five dollars at least; and he said he would give him (Clark) twenty-five dollars if he would go and get him the money; and as he wanted it to pay out at Springfield, he would meet him (Clark) at Bellows Falls the following Friday, and bring a note with one or more names to it of persons (among them John P. Alger) that had been suggested as sureties. Clark promised to go immediately; and did go the next morning to Newport, and from thence to Bellows Falls on Friday, and there remained waiting for Bur-

pee until the next morning, when he went back to Newport, stayed there over Sunday and returned to Saratoga on Monday. He paid, for expenses of this trip, over twenty dollars. On his return to Saratoga he met Burpee at John P. Alger's house, and let him have the money, taking a note therefor of six hundred dollars, made by Burpee and Alger. After Burpee had received the money, and was about leaving, Clark said to him, "Burpee, what about the matter of expenses?" when Burpee replied, "I do not want to give you the money to-day, but will give you my note on demand; and pay it in a short time." Clark wrote a note for twenty-five dollars and Burpee signed it.

It was upon this proof, substantially, it was adjudged that the plaintiff had himself shown the note to be usurious, and was accordingly nonsuited. I regard this a plain error. The evidence tended to show that the twenty-five dollar note (which it was claimed in the pleading, was without any legal consideration, and rendered the six hundred dollar note void for usury) was given to repay Clark for trouble and expense incurred by him, at the request of Burpee the borrower, in going to Newport for the money, and that the amount of the note was only two or three dollars more than the actual expenses of the trip. If this were so there was no usury. But, manifestly, the proof did not disclose a transaction usurious *per se*. Whether or not the trip to Newport for the money was intended as a cover for usury, was a matter for the consideration of the jury. If the jury believed that it was undertaken in good faith, at Burpee's special request, and upon his promise to reimburse for the trouble and expense of the journey, then the taking of the twenty-five dollar note did not render the transaction usurious. Even when the lender without any special agreement with the borrower, in addition to lawful interest, takes a commission by way of compensation for trouble and expense necessarily incurred in and about the business of the loan, the transaction would be supported, provided such commission was not intended as a device to cover a usurious loan.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All the judges concurred.

Judgment reversed, and new trial ordered, costs to abide event.

ELIAS *v.* FARLEY.

June, 1867.

To constitute a valid levy on personal property, as against the debtors or their assignee, under an assignment void for fraud as toward creditors, it is not necessary that the officer take manual possession, or assume entire control. It is enough to visit the goods, exhibit the execution to the person in possession; declare a levy made, and note it on the execution.

Notice to the assignee is not essential.

The test of a valid levy is whether enough has been done to subject the officer to an action of trespass, but for the protection of the execution.

An assignment for benefit of creditors is void if the debtor thereby prefers his landlord for rent of his dwelling, with intent to secure the occupation of the dwelling for himself and family, subsequent to the assignment, without further payment.

Israel and Aaron Elias sued Benjamin Farley, sheriff of Niagara county, for the value of certain goods seized and sold by defendant, upon executions against Samuel M. Weiner, to whom defendant claimed that the goods seized belonged.

On the trial, a general assignment for benefit of creditors, made by Weiner to one Baer, dated November 27, 1857, was read in evidence; in which, among other preferred creditors, was mentioned, George Judson, for rent, sixty dollars; which sum it appeared was for the use and occupation for a dwelling, prior and subsequent to the assignment. The court charged the jury that if Weiner preferred Judson in the assignment, with intent to secure to his benefit the future use of the dwelling, without paying rent or becoming liable therefor, then the assignment was void.

The other facts, material to the points decided, are stated in the opinion of the court.

P. L. Ely, for plaintiffs, appellants.

W. A. Butler, for defendants, respondents.

By the Court.—Hunt, J.—Numerous exceptions were taken during the trial. Some of them are conceded by the appellants to be without merit.

I have examined them all with care, but do not think it necessary to discuss any of them, other than the exceptions taken to the charge of the judge. Weiner was a merchant in Lockport, and the owner of the goods in question. In November, 1857, he made an assignment to one Baer. The assignment was alleged to be fraudulent. Testimony was given upon this question, and the jury by their verdict decided that it was fraudulent. On January 23, 1858, the deputy sheriff made the levy under which the goods were afterwards removed and sold. It is in relation to the validity of this levy that the question is made. On January 26, Baer made a sale to the plaintiffs of all the goods remaining unsold, which sale, it is alleged, was also fraudulent. The deputy sheriff testified that, having these executions in his hands, he presented the same to Weiner at his store for payment; that he levied on the goods at that time; that he told Weiner of the levy, at the time in the store, and that certain clerks named were also in the store. On being cross-examined, he further stated: "I made the levy January 23; I asked Weiner to turn me out property on the executions; he said he had no property; I told him I was authorized to levy on that stock of goods; I told Weiner I had made a levy on the stock of goods." On the same day he indorsed upon the execution, "Levied, January 23, on all the goods in the store lately occupied by S. M. Weiner." Baer, the assignee, was not present at this time.

In substance, the sheriff, with the executions in his possession, went to the person having charge of the property, or who, with others, was in its apparent possession, and in view and control of the goods, informed such person that he levied on the goods, and indorsed a memorandum of such levy upon the executions.

No notice of the levy was given to Baer, the assignee. It was sufficient to give it to the person in charge. The jury have found that, as to creditors, the title was in Weiner, and not in Baer. No notice to Baer could have been necessary.

The plaintiffs' counsel requested the court to charge the jury that there was no evidence of a sufficient levy upon the goods to entitle the defendant to hold the goods. The court declined so to charge, and the plaintiffs excepted. The court charged the jury that it was not necessary for an officer to take manual

possession of the goods, or to assume the entire control over property, to constitute a valid levy; that if the sheriff went into the store where the goods in question were, having in possession the executions, for the purpose of levying on the goods, and found Weiner in the store, apparently in possession, exhibited the executions to Weiner, informed him that he levied upon the goods, and he then levied and made a minute upon his executions, this constituted a sufficient levy. To this the plaintiffs excepted. I am of the opinion that the evidence showed a sufficient levy, and that there was no just ground of exception to the charge. Camp *v.* Chamberlain, 5 *Den.* 198; Bond *v.* Willet (in this series); Roth *v.* Wells, 29 *N. Y.* 471; affirming 41 *Barb.* 194. In the latter case, the rule is thus laid down by MULLIN, J.: "To constitute a valid levy, the officer must enter on the premises where the goods are, and take possession of them, if that be practicable; if not, then he must openly and unequivocally assert his title to them by virtue of his executions. It is not essential to the validity of the levy that he take actual possession of the goods, or that he remove them from the custody of the debtor. The test of a valid levy is whether enough has been done to subject the officer to an action of trespass, but for the protection of the execution." In that case the defendant went to the plaintiffs' store, saw the goods, asserted his right to them by virtue of his levy, in the hearing of one of the plaintiffs, and subsequently the fact that a levy had been made was indorsed on the executions. See, also, the explanation of the rule as given by SELDEN, J., in Roth *v.* Wells.* The case of Roth *v.* Wells was elaborately argued, and the reported opinions show that all the authorities on the subject were before the court, and were carefully considered. It is a clear authority in favor of the defendant, and it is not necessary to go further in the citation of cases.

It appeared from the assignment of Weiner that a preference was given therein to one George Judson, to the amount of sixty dollars, for rent. On this branch of the case the court charged

* Compare Bond *v.* Willet (vol. 1 of this series, p. 165). Where also Roth *v.* Wells is treated as authority for holding that, *as against the judgment debtor*, the sheriff has a right to sell his goods, within his bailiwick, without any actual levy.

the jury that if Weiner preferred Judson for this sum for the occupation of the dwelling-house used by him, before and subsequent to the assignment, even though a *bona fide* liability, with intent that the same should accrue to Weiner's future benefit, by securing to himself and family the future use of said dwelling-house, without paying rent or being liable therefor, the assignment was void. To this charge the plaintiff excepted. The law of this proposition is clearly sound. 2 *N. Y.* 365; 4 *Id.* 211; 5 *Id.* 547. The evidence from which the jury were authorized to draw the inference of the proposed intent, although not strong, was sufficient, I think, to raise the question.

These questions are the only ones requiring particular notice.

The judgment should be affirmed.

All the other judges concurred, except BOCKES, J., who was absent.

Judgment affirmed.

ELY *v.* COOK.

December, 1863.

Affirming in part 6 *Abb. Pr.* 366; S. C., 2 *Hill.* 406.

Attorney and client may agree that any costs to be recovered by the latter, in an action, shall belong to the former; and such agreement, being followed by recovery of judgment for costs, and an assignment thereof to the attorney, constitutes him the owner of the judgment, and prevents it being set off against a debt due from the client to the debtor in the judgment.*

The following are sufficient statements of the facts out of which indebtedness arose, to sustain a confession of judgment:—

"The defendant has, from time to time, borrowed of the plaintiff money, and there is now due to the plaintiff from the defendant the sum of fifteen hundred dollars for cash borrowed, for which the plaintiff holds the note of the defendant, bearing date the 12th day of November, 1850, and payable six months after date."

"The plaintiff has assumed for the defendant the payment of the sum of two thousand dollars, for which the defendant has given to the plaintiff two notes made by said defendant of one thousand dollars each; one

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* Compare McGregor *v.* Comstock, 28 *N. Y.* 237.

payable sixty days from the 12th of November aforesaid, and the other in ninety days from said date."*

In proceedings for a discharge under the two-thirds act (2 *R. S.* 17, § 7), the omission to swear to the affidavit annexed to the insolvent's petition, before the magistrate, and to have it subscribed by him, prior to the granting of the order that creditors show cause, renders the discharge void for want of jurisdiction.

A due verification of the petition, subsequent to granting the order, does not cure the defect.

Smith Ely brought this action, in the New York Common Pleas, against George Cook and the Messrs. Sherwood, to have a discharge in insolvency declared void, and a judgment set off.

On November 29, 1850, the defendant Cook had confessed judgment to Ely, the present plaintiff.

The confession (after the usual consent that judgment be entered), stated the facts in reference to the indebtedness, in language which is given in the head-note.

On December 31, 1851, Cook obtained a discharge from his debts under 2 *R. S.* 17, § 7, known as the "Two-thirds act."

In 1851 Ely brought a creditors' suit upon his judgment against Cook, seeking to set aside an assignment made by Cook as fraudulent as against them.

The Messrs. Sherwood, who were Cook's attorneys in that action, agreed with him, when they undertook the defense of the action, that the costs, if any, should belong to them; and they succeeded in the defense, and recovered judgment for costs in Cook's favor. Upon the recovery of the judgment for costs, Cook assigned it to them.

Ely brought the present action, against Cook and the Messrs. Sherwood, asking that the insolvent discharge be declared void, and that the judgment which he held against Cook should be set off against the judgment recovered by Cook, and which had been assigned to the defendants Sherwood. The objection to the discharge was that the affidavit annexed to the petition of the insolvent was not sworn to by the petitioner before the

* See also Read *v.* French, 28 *N. Y.* 265; Acker *v.* Acker, Clements *v.* Gerow, and Gandall *v.* Finn, reported in this series; and Frost *v.* Koon, 30 *N. Y.* 428; Ingram *v.* Robbins, 33 *Id.* 403; Union Bank *v.* Bush, 36 *Id.* 631.

recorder, nor subscribed by the recorder prior to granting the order for the creditors to appear and show cause why the discharge should not be granted, as is required by section 7 of the act.

The cause was tried before BRADY, J., who held that the Sherwoods were protected not merely by a lien, but by the fact that the costs were from the first earned by, and belonged to, them under their agreement with their client; but that Cook's discharge was void. He accordingly gave judgment in favor of plaintiff as against Cook, but dismissed the complaint as against the Sherwoods.

From the former part of the judgment defendant Cook appealed, and from the latter part the plaintiff appealed, and the court at general term were of opinion that the decision in favor of the Sherwoods was right; but that the main ground of relief, —viz: the set-off,—having thus failed, and the plaintiff's judgment being also questionable in form, the plaintiff was not entitled to judgment against Cook; and they therefore affirmed the judgment in favor of the Sherwoods, with costs, but reversed the judgment as against Cook without costs. Reported in 6 *Abb. Pr.* 366; S. C., 2 *Hilt.* 406.

Plaintiff then appealed to this court.

C. Bainbridge Smith, for plaintiff, appellant.

H. A. Cram, for defendants, respondents.

BY THE COURT.—DAVIES, J.—Assuming the judgment to be valid, and the discharge void, the plaintiff clearly would be entitled to no relief against the defendants Sherwood, in this action, if the conclusion of law of the judge is correct, viz: that the agreement made between Cook and the Sherwoods was good and valid, and the subsequent assignment of that judgment by Cook to them passed to them the said costs and judgment. If we adhere to the case of Rooney *v.* Second Avenue Railroad Company, 18 *N. Y.* 368, there would not seem to be much doubt upon this subject. In that case it had been agreed between the plaintiff and his attorney, that the latter should commence and prosecute that action to its final termina-

tion, without fee and at his own risk, and upon his final success, he should receive for his services one half of the recovery, and if the amounts should not exceed six hundred dollars, he was also to have the taxable costs. The plaintiff gave the attorney an irrevocable power of attorney to receive the amount of the recovery, and this court held that the attorney had a lien upon the judgment recovered by him, for his services: that the legal measure of these services was the taxable costs, so that it always happened that the extent of the lien was equal to the costs recovered in the action, And cases were cited showing that to this extent the attorney was regarded as the equitable assignee of the judgment. Judge HARRIS, in his opinion, says, that the principle upon which the right of the attorney to protection of his lien had been sustained is certainly unaffected by the Code. As in other cases of lien, the attorney is protected, because it is by his labors and skill that the judgment has been recovered. In that case, the agreement between the attorney and his client was sustained; thus holding that the attorney, independent of any agreement, had a lien upon the judgment recovered, for his costs, to the extent of the amount thereof, but that it was competent for the attorney and client to fix a larger or different amount of compensation; and the right of the attorney, under such agreement, would be protected. That case is therefore an authority directly in point to sustain the judgment rendered in this action.

The agreement made here is a fact established in this case, and it can be decided on that ground, independent of the question of lien of the attorney for costs, as such. Here the attorney was to have the whole amount of the recovery, as his compensation for carrying on the defense to the action prosecuted by this present plaintiff, to set aside Cook's assignment. It was lawful to make such an agreement. It was based upon a good consideration, namely, services rendered and to be rendered in the defense of that action. After such agreement was made, Cook ceased to have any interest in the recovery in that action. Whatever judgment he should recover therein, of right belonged to the defendants Sherwood, and not to the defendant Cock. In executing to them the assignment of

November 6, 1856, he did but do what in equity he would have been compelled to do. The plaintiff has therefore no legal or equitable claim to have this judgment, which, although recovered in the name of Cook, did not in fact belong to him, nor had he any interest therein, applied in reduction of the debt which Cook owes to him, upon his judgment. The judgment, therefore, of the New York common pleas was in all respects correct, as in favor of the Sherwoods, and should be affirmed with costs.

But the judgment of the general term reversing that of the special term, against the defendant Cook, must be reversed, and the judgment of the special term against him affirmed with costs. The plaintiff's judgment against him was valid, and in all respects a compliance with the provisions of the Code. The statement conforms to its requirements.

The assignment and discharge of the defendant Cook were void, for the reason that the recorder had no jurisdiction of the proceedings, in that the affidavit annexed to the insolvent's petition was not sworn to by him before the recorder, nor subscribed by the recorder, before granting the order for the creditors to appear and show cause. The subsequent verification of the petition did not cure this defect; and consequently the special term of the common pleas correctly held the discharge to be void.

The plaintiff was entitled, therefore, to a judgment against the defendant Cook, declaring such assignment and discharge void, and for the amount due to him.

ROSEKRANS, J., read a memorandum of opinion, to the same effect, in respect to the latter questions, holding that the judgment was valid as between the parties (citing 24 *N. Y.* 110, 325), and that the discharge was void for want of jurisdiction consequent upon the omission of the affidavit; but he dissented as to the right of set-off.

BALCOM, J., was also for reversal and a new trial.

EMOTT, J., concurred in the opinion of DAVIES, J., as to the right of set-off, but not as to plaintiff's right to have judg-

ment against Cook, for the incidental relief against the discharge, having failed in the main relief of set-off.

The other judges concurred in the opinion of DAVIES, J.

Judgment reversed, and judgment of special term affirmed, with costs to appellant against the defendant Cook, and with costs to the respondent Sherwood, against the appellant.

ELY *v.* NORTON.

June, 1867.

One to the payment of whose debt money is applied which belongs to a third person, is liable therefor in an action by the latter, if he suspected and had reason to believe that it did belong to such person, and he parted with no value on the faith of the transaction.*

Alfred Ely sued Luther T. Norton in the supreme court; his complaint alleging three causes of action;—one for money had and received; another, for money lent and paid; and the third, alleging that one George McLean became possessed of money as plaintiff's agent, which at the request of the defendant he paid out to the defendant's use, and that defendant promised to repay the same, but had not done so, &c.

These three counts were for one and the same claim.

The facts proved on the trial were, that the defendant Norton and George McLean, had been in partnership; that they dissolved, and Norton released the assets to McLean, upon McLean's agreement to pay all the firm debts.

McLean, who was carrying on another business, on his own account, besides that of the late partnership, procured plaintiff to indorse a draft for him, to raise money to be used in that other business; and not being ready to meet the draft at its maturity, he made and indorsed two other drafts, and gave them to the plaintiff, at plaintiff's request, to indemnify him against his liability on the first draft. Plaintiff procured these two drafts to be discounted, and deposited the proceeds to his own

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* Compare Henry v. Wilkes, 37 *N. Y.* 662.

credit in bank. He then drew two checks against the deposit, and gave them to McLean, with instructions to apply them to take up the first draft, and thus discharge plaintiff from his liability as accommodation indorser of that paper.

In contravention of these instructions, McLean fraudulently retained the money which he received on the checks. Shortly afterward, a debt of the late firm of Norton & McLean fell due, and the creditor proceeded to foreclose a chattel mortgage which he held as collateral, and sold thereon the assets of the late firm.

Meanwhile George McLean had made an assignment, in trust for the benefit of creditors, to his brother Murray McLean; and the latter purchased the property at the sale, and procured from George McLean, a part of the funds which George had received as the proceeds of plaintiff's checks, and used the same in paying the purchase price. Defendant was present at the sale. There was conflict in the testimony as to whether defendant knew plaintiff's money was used for the purchase; but the referee found that defendant had reason to suspect that the money was plaintiff's, and that he assented to its payment.

The referee held, that the money obtained by George McLean on plaintiff's checks was, in McLean's hands, plaintiff's property, held by McLean under special instructions; and that the appropriation of part of it to pay the debt of Norton & McLean, was made with the knowledge and assent of defendant. Judgment for plaintiff having been affirmed at general term, defendant appealed.

W. C. Rowley, attorney for defendant, appellant;—Insisted that defendant never *received* the money, and that it was not paid at his *request*, and therefore the action did not lie;—citing Dumond *v.* Carpenter, 3 *Johns.* 183; Amidon *v.* Wheeler, 3 *Hill*, 137; Appleton Bank *v.* McGilvray, 4 *Mass.* 518; Catland *v.* Loyd, 6 *Mees. & W.* 25; Sadler *v.* Evans, 4 *Burr.* 1985; Cox *v.* Prentia, 3 *Maule & S.* 344; Edwards *v.* Hodding, 5 *Taunt.* 815; Horsfall *v.* Handley, 8 *Taunt.* 136; Marsh *v.* Kieting, 1 *Bing.* 198; S. C., 1 *Scott* (Eng. Cases), 5; Harrison *v.* Walker, *Peake*, 111; 2 *Kent Com.* 7 ed. 198–9; *Story Agency*, §§ 157–

164; 229; 2 *Loftus*, 51–57; Henry *v.* Marvin, 3 *E. D. Smith*, 71; Mason *v.* Waite, 17 *Mass.* 560; Hall *v.* Marston, *Id.* 575; Ellis *v.* Ohio Life & Trust Co., 4 *Ohio*, 628; *Chitty on Cont.* 526–527, 529, 514–523; O'Coaly *v.* Natchez, 1 *Smedes & M.* 31; Burnap *v.* Partridge, 3 *Vt.* 144.

John H. Reynolds, for plaintiff, respondent;—Cited, Dumond *v.* Carpenter, 3 *Johns.* 183; Henry *v.* Marvin, 3 *E. D. Smith*, 71; Amidon *v.* Wheeler, 3 *Hill*, 137; Pierce *v.* Crafts, 12 *Johns.* 90; Mason *v.* Waite, 17 *Mass.* 560; Hall *v.* Marston, *Id.* 575; Caussidiere *v.* Beers (reported in vol. 1, p. 333, of this series).

By the Court.—Bockes, J.—This is an appeal by the defendant from the judgment of the general term of the supreme court, affirming a judgment entered on the report of a referee.

The referee finds as the facts of the case, that one George McLean became possessed of a sum of money amounting to more than four thousand dollars, belonging to the plaintiff, intrusted to him by the plaintiff for a special purpose. That, in violation of his duty as such depositary, and in fraud of the rights of the plaintiff, McLean, through the instrumentality of his brother, and with the knowledge and assent of the defendant, applied to the use of the latter the sum of one thousand one hundred and seventy dollars, part of said sum of four thousand dollars. That the defendant suspected and had reason to believe that the money so applied to his use was part of the money of the plaintiff which had been intrusted to McLean for the special purpose aforesaid. The referee directed judgment for the plaintiff and against the defendant for the sum so applied to his use with interest.

There is abundant evidence to support the finding of the referee, and it follows, of course, that the case must now stand on the facts found and stated by him. And on those facts the right of recovery by the plaintiff was clear beyond possible question. The defendant received the plaintiff's money to his own use and benefit, with notice of its diversion and misappropriation. According to the facts found, he suspected and had reason to believe that the money was the property of the plaintiff. This was notice to him of the fact, and besides he parted

with no consideration, real or pretended, on the faith of the transaction.

The judgment should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs.

EMERSON *v.* BLEAKLEY.*

June, 1867.

An action in the nature of replevin, brought by an assignee for the benefit of creditors, to recover damages from a sheriff, for the tortious taking of assets, does not abate by the death of the plaintiff. The cause of action survives by virtue of 2 *R. S.* 447.

The proper parties to be substituted, in such a case, are the personal representatives of the deceased trustee, since the action relates to personal property.†

But, if a successor in the trust is appointed, and he is substituted as plaintiff in the action upon the consent of the defendant, the defendant cannot afterwards avail himself of the objection that the action is not properly prosecuted by him as plaintiff.

The rule that the testimony given on a former trial, by a witness since deceased, is admissible in evidence, is applicable to the testimony given by a party to the action.

In an action to recover specific personal property, the jury found for the plaintiff as to the one part, and for the defendant as to the other, designating the articles generically, without specifying them in detail. *Held*, that it was competent for the court to render the verdict certain by directing an amendment of the complaint, inserting therein a list of each class of articles intended by the generic designation of the verdict.

Robert Grant, assignee of William Montgomery, brought this action, in the supreme court, against William Bleakley, Jr., Sheriff, &c., Jesse M. Emerson being substituted for plaintiff on his death. The appellant relied on the following facts.

On or about December 17, 1859, one Alfred Booth obtained a judgment in the supreme court, in Westchester county, against William Montgomery and William Garabrant for two

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* See for decisions affecting this case, Booth *v.* Bunce, 31 *N. Y.* 246; The Same *v* The Same, 33 *Id.* 139.

† Compare Bunn *v.* Vaughan, vol. 1 of this series, p. 253.

thousand two hundred and sixty-eight dollars and thirty-eight cents, on two promissory notes made by them as "Montgomery & Co."

On the 20th of the same month, 1859, Booth caused execution thereon against the property of Montgomery and Garabrant, to be issued to the defendant in this suit, Bleakley, then sheriff of Westchester county.

On October 20, 1857, a stock company had been organized by William Montgomery and four others, by the title of the "New York Steam Saw-mill and Machine Company."

On the next day, one day after the date of the certificate of incorporation of the company, William Montgomery and one Lund (who had become a partner of Montgomery in the place of Garabrant), for the consideration of one hundred thousand dollars, made a bill of sale of "all the materials, good-will, and appurtenances of whatever kind or nature appertaining and belonging to the manufacturing and machine business heretofore conducted under the name of William Montgomery & Co.," together with the full right to the immediate occupancy of the premises in which said property was contained, &c., to the said New York Steam Saw-mill and Machine Company.

On the same day Montgomery and Lund executed another bill of sale to said Steam Saw-mill and Machine Company, for consideration of fifteen thousand dollars, "of all the steam saw-mills, steam engines, boilers, machinery, and stock of all kinds manufactured, or in process of manufacture, appertaining to and belonging to the engine and machine manufacturing department of the business heretofore conducted under the name of Messrs. Montgomery & Co., together with all the belongings thereto," &c.

Montgomery became the president of this machine company on its organization, and always continued such president, and had the management and direction of its business.

Montgomery & Co. had a lease of the factory premises for five years from May 1, 1855, which passed to the machine company under the bill of sale first above mentioned.

On December 23, 1858, an agreement was entered into between Montgomery and certain others of the stockholders of the said machine company, by which said Montgomery was to become

possessed of their stock on certain conditions, which it is claimed were never performed by Montgomery.

Montgomery, on November 29, 1859, executed a general assignment for the benefit of his individual creditors, to Robert Grant, "of all the estate and property, real and personal, of him, the said William Montgomery, either individually, or as a member of the late firm of Montgomery & Co., or a corporator or stockholder of the New York Steam Saw-mill and Machine Company."

Under this assignment Grant claimed title to the property in question. And as the defendant, as sheriff, had in the first instance levied upon said property, under the said execution of Booth, against Montgomery and Garabrant, this action of replevin was brought by Grant.

On a former trial of the cause the plaintiff recovered judgment for the full amount of his claim, after the entry of which he died. Subsequently Montgomery, the assignor, applied to the court by petition for the appointment of a successor in the trust, which the court granted by the appointment of Emerson, the present plaintiff. The court also granted an order substituting Emerson in the place of Grant as plaintiff in this action. Both these orders were made upon the written consent of defendant.

Emerson being thus substituted as the successor in trust and as plaintiff in the action, defendant appealed from the judgment which Grant had recovered, the result of which appeal was that a new trial was ordered.

On the trial, the jury found that the stock and materials belonged to Robert Grant, valuing the same at thirteen thousand two hundred and thirty-three dollars and eighty-one cents; and that the tools and fixtures belonged to the Steam Saw-mill and Machine Company, valuing the same at thirteen thousand one hundred and fifty-eight dollars.

Upon the coming in of the verdict, the court directed the complaint to be amended so as to conform to the evidence, by designating the portion of the property found for plaintiff by the jury, and described by them as "stock and materials," and by designating also the portion found for defendant, which the jury had described as "tools and fixtures." The amendment

was made by inserting at the end of the list of articles in the complaint, an enumeration of those which were known as "tools and fixtures," and a statement that the residue of the property was known as "stock and materials." This amendment was made against the defendant's objection.

Judgment entered in conformity with the verdict, was affirmed by the supreme court at general term. Defendant appealed.

S. E. Church, for plaintiff, respondent;—Cited 2 *R. S.* 5 ed. 19, § 53; *Id.* 22, § 87; *Id.* 213, § 14; *Id.* 670, § 14; *Id.* 777, § 113; 2 *Den.* 125; *Code*, § 113; § 121, subd. 2; Amendment of 1857, § 101; 4 *Abb. Pr.* 106; 3 *R. S.* 5 ed. § 87, et seq.; 29 *Barb.* 664; 18 *How. Pr.* 112; 2 *Johns*, 17; 11 *Id.* 28; 12 *Wend.* 41; *Code*, § 173.

R. W. Van Pelt, for defendant, appellant;—Cited, Burkle *v.* Luce, 1 *N. Y.* (1 *Comst.*) 163; 2 *R. S.* 576, § 2; *Id.* 386–7, §§ 2, 3; Webber *v.* Underhill, 19 *Wend.* 447; Cutfield *v.* Corney, 2 *Wils.* 83; *Code*, § 121; Hopkins *v.* Adams, 5 *Abb. Pr.* 351; Fuller *v.* Lewis, 13 *How. Pr.* 219; Dwight *v.* Enos, 9 *N. Y.* 470; Seaman *v.* Luce, 23 *Barb.* 240; Hall *v.* Robinson, 2 *N. Y.* 293; 5 *N. Y.* (1 *Seld.*) 344; 1 E. D. *Smith*, 522; Renaud *v.* Conselyea, 7 *Abb. Pr.* 105; S. C., 4 *Id.* 280; Manning *v.* Monaghan, 23 *N. Y.* 539; Cobb *v.* Cornish, 16 *Id.* 602; Gilbert *v.* Beach, *Id.* 606; Ackerman *v.* Emott, 4 *Barb.* 626; Torrey *v.* Bank of Orleans, 7 *Hill*, 260; Dobson *v.* Racey, 3 *Sandf. Ch.* 60.

HUNT, J.—The appellant claims a reversal of the judgment below, on the ground that this being an action of replevin, for a tortious taking of the property in question by the defendant from the possession of Grant, the action abated by the death of Grant, in whom the right of action existed. Grant died a year and a half before the trial occurred on which the present judgment was rendered; and the claim involves the invalidity of all the proceedings subsequent to his death. The appellant also claims that the existence of a verdict in favor of Grant, at the time of his death, places the plaintiff in no better situation, for

the reason that that verdict was afterwards set aside by the court of appeals; and a verdict set aside, it is claimed, is, in law, as if there had been no verdict. The appellant insists that upon the death of Grant, the trust estate conveyed to him by the assignment of Montgomery, descended to his personal representatives, and that this action should be brought by them, if by any one, and not by a newly appointed trustee. These suggestions involve separate considerations, which will be more readily appreciated by a separate examination of the propositions.

First. Did the action of Grant, for the tortious taking and conversion of this large amount of property, abate by his death, in the sense that all claim for compensation was thereby ended? If this action had been to recover damages for an assault and battery or a libel of which he had been the subject, upon his death before verdict, all right to damages, in any form or by any party, would have ceased. The maxim "*actio personalis moritur cum persona*," applies to such a case. In the present case a debtor in failing circumstances had conveyed to Grant a large amount of personal property, upon the trust and direction that he should apply the proceeds of the same in the payment of certain specified debts. The defendant, as sheriff, seizes the same upon an execution against the insolvent debtor, and removes the same from the possession of Grant. The assignee, Grant, brings an action to recover damages for such removal, but before trial he dies. The rule in such case is provided by statute (2 *R. S.* 447, § 1): "For wrongs done to the property, rights, or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrong-doer, and after his death, against his executors and administrators, in the same manner and with the like effect in all respects, as actions founded upon contracts." It is further provided by section 121 of the Code of Procedure that "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue." Being a claim for wrongs done to the property of Grant, and it

being clear, therefore, that the cause of action survived the death of Grant, the right to damages did not cease with his life.

Second. It is said, however, by the appellants, that this cause of action vested in Grant's executors, and not in a new trustee to be appointed by the court; and this is the second question in the case. I understand the law to be that personal estate held in trust, upon the death of the trustee descends to, and the title vests in, the personal representatives of the trustee, and that the provisions of the statute giving the title to a trustee to be appointed by the court, apply to trusts in real estate only. 1 *R. S.* 730, § 68; Savage *v.* Burnham, 17 *N. Y.* 561; Kane *v.* Gott, 24 *Wend.* 641; Bunn *v.* Vaughan (vol. 1, p. 253, of this series). The parties, however, have made the law for themselves in the present case, by their stipulation of October 20, 1862. This stipulation is signed by the appellants' attorneys; recites that Grant sued as the assignee of Montgomery; that he died since judgment had been entered; that Emerson had been appointed his successor in the execution of the trusts contained in the assignment, and that an appeal was about to be taken from the judgment, and concludes thus: "We do hereby consent that the said Emerson be substituted for said Grant in this action." This binds the appellants as completely as if they had stipulated that Emerson was Grant's executor, and that the action should proceed without further delay. They agree, in substance, that Emerson is the proper person to prosecute Grant's rights under the assignment, and consent that he may do so as plaintiff in the present action. If the general rule of law is as claimed by the appellants, it is evident that the present action is properly prosecuted. This view of the case renders it necessary to consider the effect of the first verdict, the vacating the same, and the rendering of a second verdict in favor of the plaintiff.

There are several minor questions presented upon the appellants' brief, which have been carefully considered, and no reason for disturbing the judgment is perceived. The questions of fact were of a doubtful character, but having been determined by the jury, we are not at liberty to interfere with them. Neither do questions of practice or regularity properly come under consideration in cases like the present. The most of the

questions of law were ruled as requested by the appellant. If any injustice has been suffered by them, it was at the hands of the jury, for which we can give no redress.

The judgment should be affirmed.

J.M.PARKER, J.—I think there was no abatement of the action by the death of Grant, the original plaintiff. The cause of action survived by virtue of the statute (2 *R. S.* 447, § 1; Webber *v.* Underhill, 19 *Wend.* 447); and this being so, section 121 of the Code of Procedure saves the action from abatement.

Although Grant held the property in question as a *trustee*, on his death it passed, under the common law, to his personal representatives, who were bound to execute the trust (De Peyster *v.* Ferrers, 11 *Paige*, 13). We held in the case of Bunn *v.* Vaughan, decided at the last term of this court, that section 68 of the article of the revised statutes relative to uses and trusts (1 *R. S.* 730,) does not relate to personal property, and that the common law rule above referred to still exists and applies in reference to such property. The consequence is, that on the death of Grant, the title to the property passed to his legal representatives, who, unless they had transferred it to Emerson, should have been substituted. But the appointment, by the court, of Emerson to execute the trusts of the assignment, and his substitution as plaintiff in the action, having both been made by the express consent and stipulation of the defendant, set forth in the case, I am inclined to think his motion for a dismissal of the complaint upon the trial, on the ground that the title to the property was in the personal representatives of Grant, was properly denied. *Non constat* that the cause of action had not passed by assignment from the personal representatives of Grant to Emerson. In that case he was the proper person to be substituted; and, I think, as against the defendant, under his stipulations, such assignment should be presumed.

The other grounds on which the nonsuit was claimed, to wit, that Grant was not the owner of the property when the suit was brought, and that it was incompetent for Montgomery to make any transfer to himself, were also properly regarded as not well taken—the first as involving a question of

fact for the jury, and the other as not covering the whole of the plaintiff's claim.

The objection to the introduction of Grant's testimony on the former trial, was properly overruled. It was but the common case of reproducing the testimony of a deceased witness. I see nothing in the objection that he was a party. He was also a witness, and therefore within the rule allowing proof of what he testified to be given. The inquiry of the witness Montgomery, whether he received any directions from Grant in regard to the property, immediately after the delivery of the assignment, was relevant and proper as part of the *res gestæ*. The question to the same witness, as to what was done with moneys, which he had stated were realized from a portion of the assigned property, was also properly allowed.

I see no error in the rulings in regard to the questions put to the witness Lund as to his delivery, when he left, of the stock, &c., at the machine shop, to Montgomery, and as to his ever again exercising any acts of ownership over the property. This was clearly pertinent to the question which was litigated, whether Montgomery owned the property, or any part of it.

The offer of the defendant to prove that the sheriff of Westchester levied upon the property in question, as the property of the Steam Saw-mill and Machine Company, after this suit was brought, was wholly irrelevant and immaterial, and was properly excluded.

The court was requested to charge "that if the sheriff (defendant) found Montgomery in the actual possession of the property levied on under the Booth execution, the plaintiff must prove a demand of said property and refusal to surrender it before he could recover," which was refused. If the property belonged to the plaintiff, the taking it out of the possession of Montgomery—who was the plaintiff's agent, using it in the plaintiff's business—in hostility to the plaintiff's right to it, was a wrongful taking as against the plaintiff (Clark *v.* Skinner, 20 *Johns.* 465), and no demand was necessary. Cummings *v.* Vorce, 3 *Hill*, 282; Dunham *v.* Wyckoff, 3 *Wend*, 280. The request was, therefore, properly refused.

As to the defendant's request to charge that Montgomery, while acting as president of the machine company, could not

become the purchaser of its property if objected to by any stockholder or creditor of the company, there was nothing in the evidence calling for such instruction to the jury, nor for anything more on that subject than the court had already said to them; for they had already been instructed that, as to all that portion of the property in question which had been transferred to the machine company, and which had been acquired by said company, the title to it remained in the company at the time of the assignment, and did not pass to Grant, and that Montgomery's interest in such property at the time of the assignment was a stockholder's interest only, and that only such interest passed by the assignment, so that the additional instruction requested was entirely nugatory.

The complaint now made by the plaintiff's counsel, that under the charge of the court it was the duty of the jury to render a verdict for the defendant as to all the property in question, and that the court below should, on that ground, have set aside the verdict, is not one which this court can listen to or redress. The case is not open to us for an examination of the facts.

The finding by the jury that Grant was the owner of that portion of the property in question described as *stock and materials*, and not of that described as *tools and fixtures*, rendered necessary a more specific description of the two classes. This the court ordered to be made by directing the complaint to be amended so as to conform to the evidence, and to designate the portion of the property found for the plaintiff, described as "stock and materials," and the portion found for the defendant, described as "tools and fixtures," to which the counsel for the defendant excepted; and thereupon the plaintiff did amend the complaint by inserting at the end of the list of articles a list of those which he denominated "*tools and fixtures*," and stated that the residue of said property was known as "stock and materials." No fault was found with the manner in which the distribution was made and the amendment carried out.

I think it was competent for the court to amend the verdict, as was in effect done, for the purpose not of adding or subtracting, but specifying in accordance with the evidence, as was

done in this case. Sleght *v.* Hartshorne, 1 *Johns.* 149; 1 *Sell. Pr.* 480; 1 *Archb. Pr.* 215; 2 *Id.* 275.

Upon the whole case, I am of the opinion that the judgment should be affirmed.

All the judges concurred except SCRUGHAM, J., who did not vote.

Judgment affirmed, with costs.

ENDERS *v.* STERNBERGH.

September, 1864; again, March, 1869.

Reversing (on the second appeal) 52 *Barb.* 223.

The contents of a document which has been lost or destroyed, without the fault of the party offering it, may be proved by secondary evidence, although such document be one, the genuineness of which, by reason of age, proves itself, without ordinary proof of its execution. In such a case the same principle of necessity which admits secondary evidence of its contents, allows proof, by testimony, of its general appearance and of its marks of antiquity.*

It is not indispensable to the admission in evidence of an ancient will or deed without ordinary proof of execution, that possession in strict accordance with the terms of the instrument be shown, if such an account of it is given as may under the circumstances be reasonably expected, and will afford the presumption that it is genuine.

Where a party claims premises by two titles, either of which is good if available, he should be permitted to introduce evidence of both titles.

Where, therefore, a party having proved title by deed, offered evidence of title to the same property by will,—*Held*, error to refuse to admit it, even though the title by deed was uncontroverted.

A grant is not to be presumed on the ground of possession and the lapse of time, except when title has been shown, by the party who calls for the presumption, good in substance, but wanting some essential matter to make it formally complete, and where the possession has been consistent with the fact presumed. Evidence being conflicting as to the possession, it is error to direct the jury to presume a grant. Per HOGEBOOM, J.

Declarations made while in possession of the estate, by an ancestor, since deceased, indicating the source of his title, with the fact that the one

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* See Graham *v.* Chrystal, reported in this series.

under whom he claimed had been in possession, may be proved by witnesses who heard them, as evidence of documentary title.

In an action of ejectment in which there was such evidence of contradictory declarations, and the evidence was also conflicting as to whether the land in question was or was not included in a will and deed by a very general description;—*Held*, that the cause ought to be submitted to the jury, and that it was error to direct a verdict for defendant.

Peter W. Enders and others sued Adam Sternbergh and others, in ejectment, in the supreme court, to recover a lot of land containing one hundred and six acres, lying in the Sternbergh patent, and another lot of land containing sixty acres, lying in Morris and Coeyman's patent.

First Appeal: September, 1864.

On the first trial they recovered the sixty acres in Morris and Coeyman's patent, lying in the town and county of Schoharie.

The facts were stated as follows, in the opinion of HOGEBOOM, J., below:

"The plaintiffs are children of Catharine and Elizabeth Enders, who were grandchildren of of Lambert Sternbergh 1st, who died in 1765, and children of his son, Adam, who died in 1764. The latter left three children, Lambert 2nd and said Elizabeth and Catharine, and left also a will, claimed to cover the premises in question, in which he devised an estate for life to his son, Lambert 2nd, with remainder over to his daughters, Elizabeth and Catharine. Under this will the plaintiffs claim title to the premises in question. Lambert 2nd died in 1829, leaving a son, Adam, who has two sons, John and Lambert, and the three latter are the defendants in the suit.

"They claim title to the premises under their father and grandfather, Lambert 2nd, under an alleged will of Lambert 1st, sometimes called the Patentee, devising the premises in question, as is alleged, to his grandson, Lambert 2nd. The latter also claimed title by deed from one Adam (sometimes called 'crazy Adam') Sternbergh, May 17, 1785, the latter being the eldest son of Jacob Sternbergh, who was himself the eldest son of Lambert 1st.

"The defendants claimed that if their title failed under the will of Lambert the Patentee, they could still trace a successful title to themselves under the deed of crazy Adam, who, it was

claimed, in default of a will, was entitled to the premises by descent under the laws of primogeniture.

"The plaintiffs claimed that there was no sufficient evidence of any seizen of the premises in Lambert 1st, at all,—or that his son Adam, the testator under whom they claimed, ever derived his title from his father, Lambert the Patentee. Lambert 1st had other sons, Abram, the father of Elizabeth Enders, one of the witnesses in the case, and Nicholas and David, executors of his alleged will; the latter, David, also having children, Henry, Philip and Peter, one of whom (Philip) had a daughter, Christina, wife of Caleb Carpenter, the latter (Caleb) being also a witness in the case, and one who, at the instigation of his wife or her uncle, (in 1844 or 1846,) burnt up the old will of Lambert the 1st, under an apprehension that it would, if discovered, endanger their title to a portion of the real estate of Lambert the elder, of which they were in possession.

"One of the leading questions in the case arose upon the exclusion by the judge, at the trial, of copies of this will, one which had been made by Carpenter some ten or twelve years before the time he burned it; he having received from his wife, and had in possession the original some seven or eight years, from about the period of his marriage. Another in the handwriting of General Gebhard (who was dead), purporting to have been copied December 27, 1829. A third in the handwriting of Hermanus Bouck, who died in 1831 or 1832. A portion of this will, alleged to embrace the premises in question, was also copied into the aforesaid deed of crazy Adam to Lambert Sternbergh 2nd, which also referred to and corresponded with the date of the will in question.*

"A motion for nonsuit was made in the case, upon the ground that the suit having been commenced November 28, 1853, more than twenty years had elapsed since the death of Lambert 2nd, which took place in 1829, and, therefore, the plaintiffs' right was barred by the statute of limitations.

* The provision in the will on which the defendants relied was as follows:

"*Item*, also, I give unto my grandson, Lambert Sternbergh, three hundred acres of land, which his mother now has in possession, or two lots."

"Much evidence was given on the part of the plaintiffs of the parol declarations of Lambert 2nd, during the time he was in the possession of the premises, tending to show that he had but a life estate in the premises in question, most of which was objected to by the defendants as incompetent, and exceptions were taken to its admission.

"Similar declarations of the defendants themselves were also introduced in evidence. These were met by counter testimony, on the part of the defendants, of declarations of Lambert 2nd, tending to show that he claimed an absolute title in fee."

The motion for nonsuit was denied.

The judge charged that if Adam Sternbergh (the testator) died in possession, leaving a will, the will *prima facie* gave a title to the plaintiffs; that if Lambert 1st was originally the owner of the premises in question, the jury might presume a conveyance from Lambert 1st to Adam, if they were satisfied that such conveyance had been made.

To this portion of the charge the defendant excepted. The plaintiffs obtained a judgment in their favor, and the court at general term having refused to order a new trial, the defendants appealed to this court.

Amasa J. Parker, for defendants, appellants.

Lyman Tremain, for plaintiffs, respondents.

HOGEBOOM, J.—The nonsuit was properly refused irrespective of the question whether the limitation applicable to the case was twenty or twenty-five years. To make the limitation applicable at all on such a motion, there must have been evidence of adverse possession, and that evidence must have been substantially uncontroverted or so greatly preponderant as to overthrow a verdict rendered in opposition to it. To justify the defense of adverse possession, the possession must appear to have not only been adverse, but continually and uninterruptedly so. Colvin *v.* Burnet, 17 *Wend.* 564; Brandt *v.* Ogden, 1 *Johns.* 156. There was much evidence to show by the declarations of Lambert, that it was not of that character, but was

consistent with the plaintiffs' title. This evidence was proper at least to characterize the possession, if not to control the title.

There was also evidence of the defendants' own admission of a similar character. It was, therefore, a proper matter for the jury to determine; and this furnishes an effectual answer to the motion for a nonsuit. Pitts *v.* Wilder, 1 *N. Y.* 525; Hunter *v.* Trustees of Sandy Hill, 6 *Hill*, 407.

I think, however, one or more copies of the will of Lambert, the patentee, were erroneously rejected. By that will three hundred acres of land (which there was evidence to show included the premises in question) were given to his grandson Lambert Sternbergh, under whom the defendants claim.

This will, if it had been produced, would have been admissible without proof, as an ancient paper. It was regular upon its face; that is, apparently executed with legal formalities. It bore date January 7, 1765; the testator died in the same year; it was "an old, ancient paper from its looks; it was rolled up; the paper was coarse; looked as if it had been folded; it was worn; ink and all looked old; coarse handwriting." It was found among the descendants of the testator, in the possession of a family whose ancestor was an executor named in the will; referred to names and places consistent with the other testimony in the case; was handed down in the family, according to the family tradition, from the executor himself, he being also a devisee in the will; and there was evidence to show claim of title and actual possession, corresponding with the provisions of the will.

If this last particular, possession in accordance with the will, is sustained by the evidence, as I think it clearly is,—for the possession of the defendants themselves, in addition to that of other parties, may be said to be of that character,—then according to all the authorities, it would have been admissible without proof of execution. Jackson *v.* Laroway, 3 *Johns. Cas.* 283; Jackson *v.* Christman, 4 *Wend.* 277.

But it never was absolutely indispensable that possession, in strict accordance with the terms of the instrument, should be shown, to entitle the paper to admission as an ancient paper. If it were so, many a title would be destroyed. Nor is it possible to trace possession back beyond the knowledge of living

men, except by tradition or hearsay, or by the intrinsic probabilities of the case, and the consistency of existing facts with such prior possession. Mere efflux of time will not make it admissible without proof. But aside from this, any circumstances which go to confirm the genuineness or authenticity of the document, make it admissible in evidence. It "must be corroborated by possession or *other circumstances.*" Jackson *v.* Luquere, 5 *Cow.* 221; Jackson *v.* Laroway, 3 *Johns. Cas.* 283; Staring *v.* Bowen, 6 *Barb.* 109, 114, 115.

A deed appearing to be of the age of thirty years may be given in evidence without proof of execution or possession, if such account of it be given as may, under the circumstances, be reasonably expected, and will afford the presumption that it is genuine. 3 *Johns. Cas.* 283; Hewlett *v.* Cock, 7 *Wend.* 371, disapproving dictum of KENT, J., in Jackson *v.* Blansham, 3 *Johns.* 298; see also Bogardus *v.* Trinity Church, 4 *Sandf. Ch.* 633; *Greenl. on Ev.* § 114, note 3.

It is said that there was no evidence that the will, or any of the copies, were thirty years old. This is an entire mistake. The paper itself, if an original (and to some extent also if a copy), bearing upon its face the marks of age and authenticity, contains intrinsic evidence of the time of its execution, more or less strong, according to circumstances.

The date of the paper, if resembling the residue of its contents, and not appearing to be altered or interpolated, or otherwise spurious, is of itself a circumstance of some strength to show the period of its execution, inasmuch as a suspicion of its genuineness is not to be unreasonably indulged. But in this case there was positive evidence of its antiquity. A deed of Adam Sternbergh (crazy Adam), introduced in evidence, and not disputed to have been executed in 1785, and recorded as early as 1786, contains an extract from this will and refers to it by its date, showing, of course, its existence at a prior period. One of the copies is proved to have been in the handwriting of Harmanus Bouck, a lawyer, who died in 1831 or 1832, twenty-five or twenty-six years before the trial, and was out of practice some years before his death; another copy, made from the last by General Gebhard, purports to have been made on December 27, 1829. Still another copy, an exact copy, and the most im-

portant of all, was made by Caleb Carpenter from the original, between the time it went into his possession, nineteen years before the trial, and seven or eight years afterward, while it was in his possession. This witness (and his wife corroborates him) describes the original will itself, and gives such particulars of its appearance and apparent genuineness as, I think, clearly entitle it to be used in evidence if its contents could be shown. I know of no rule of law which absolutely requires the evidences of genuineness and authenticity to be determined by *inspection* before a court and jury, instead of *competent proof* from persons who had seen it—its non-production being sufficiently accounted for.

If then the paper itself, if produced, would be admissible, is not evidence of its contents admissible in case it be lost or destroyed? I am not aware of any exception to the rule except this, that if the paper be purposely destroyed by a party having an interest in its contents, he shall not be permitted to substitute secondary evidence, because the willful destruction of the more reliable witness tends to throw suspicion upon the verity and authenticity of the inferior evidence. Riggs *v.* Tayloe, 9 *Wheat.* 483; Blade *v.* Noland, 12 *Wend.* 173; 2 *Cow. & H. Notes*, 1206.

Further than this, I am not aware that the rule has ever been carried. Innocent parties should not suffer from the indiscretion or wickedness of others with whom they have no connection, and of whose acts they have no knowledge. I do not discover anything tending to cast suspicion on the defendants as having been in any way connected with, or cognizant of the destruction of this paper. The established rule, therefore, applies that the next best evidence is to be admitted. Fetherly *v.* Waggoner, 11 *Wend.* 599.

The secondary evidence, if in its nature admissible, was of the most satisfactory character. It was in writing, and sworn to be an exact copy. A second copy, differing, however, in the name of one of the subscribing witnesses, was also produced; but whether copied from the original, does not appear. A third copy, which, though copied from the last preceding copy. was in all respects like the first copy, was also produced.

These were all alike, except in the single particular above

mentioned, and coincide also in point of date and contents with the extract from the will contained in the deed of crazy Adam, of 1785.

The first being proved to have been taken from the original, was entitled to very high consideration as evidence, and, as it seems to me, was clearly admissible. I think it is no sufficient answer to this to say this is dangerous evidence. Like all secondary evidence, it is not equally satisfactory or safe with that of the original paper; but it would invade a perfectly well settled rule of law, and in many cases operate most oppressively, to withdraw it entirely from the consideration of the jury.

Nor do I think we are authorized to say that the exclusion of this evidence was not injurious to the defendants. How can we know this? and what is the legitimate inference, when the foundation stone of one of two distinct defenses is thus abruptly removed? To say that the defendants have another equally strong defense, if either were available, is to make an assumption which the jury, it is quite possible, were not prepared to sanction. The other defense was founded upon the deed of crazy Adam. It may be that they concluded that a deed from crazy Adam did not confer a title altogether sound, especially as one of the witnesses testified that one of the defendants informed him that crazy Adam was not considered competent to transact business. Further, the will and the deed support and corroborate each other in regard to the defense founded on the deed. There being evidence to show there *was a will*, it was proper, if not necessary, that that will should be produced, and being produced and claimed to confer only an estate for life, the two together concur to give character and strength to the title set up under them on the part of the defendant. Besides, this case comes up on exceptions, and it is nearly a universal rule, that material evidence erroneously admitted, or excluded upon exception, requires a new trial, and that we are not permitted to speculate upon the probable effect of the error upon the final result.* Dresser *v.* Ainsworth, 9 *Barb.* 619; Worrall *v.* Parmelee, 1 *N. Y.* 519.

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* Compare, however, People *v.* Gonzalez, 35 *N. Y.* 49; Vandevoort *v.* Gould, 36 *Id.* 639.

It does not belong to the judge at the trial to reject one of two good defenses which the party may offer, especially when he does not put his decision on any such ground, nor indicate to the jury his opinion on the other branch of the case. The party has a right to take his chances before the jury on both, and it is dangerous for a court of review to indulge in conjectures as to the probable non-prejudice to a party of the exclusion of an instrument of evidence vital to one branch of his defense. There would be more plausibility in this aspect of the case if we could see that the judge at the trial had distinctly charged that the defendants, if entitled to succeed at all, were entitled to a verdict of the jury under the deed from crazy Adam.

Again, the will seems to have been an important item of evidence to rebut the presumption of a deed relied on by the judge in his charge, from Lambert to Adam. This was material evidence on that point.

I think further, that if the exclusion of the will at the trial was upon the ground (as it manifestly was not) that the defendant had another substantial ground of defense, such ground should have been (as it was not) stated by counsel and sustained by the judge as a legitimate objection to the testimony. The parties then could have distinctly taken their exception to such a ruling and distinctly prepared themselves for other grounds of defense.

Again: it is said that the rejection of this evidence was of no moment for the further reason that the will, omitting words of inheritance, gave only a life estate to Lambert 2nd, waiving the question whether the will conferred a fee or life estate only on Lambert 2nd (which is not without embarrassment, for the will purports to dispose of all the testator's *temporal estate*, and there is no residuary clause giving the remainder of his estate to any other person). I think it cannot be said this evidence was unimportant, for the following reasons:

1. If it showed a *life estate* in Lambert 2nd, it was proper to show that fact as *introductory* to and in *connection* with other evidence on which a complete defense was to rest. Thus it was competent to show it in connection with the deed from crazy Adam; which evidence it corroborated and supported.

2. It tended to show *title out of Adam*, the son of the testa-

tor on whom (Adam) the plaintiffs relied as the source of their own title. Adam died before his father, Lambert, and if Lambert was seized, and died in possession of the premises, of which there was much, not to say conclusive evidence, proof of Lambert's will, carrying away the estate from Adam, and, of course, from his devisees, would be a very material link in the chain of defendants' evidence, and whether it showed an estate in fee in Lambert 2nd, was not so material as that it showed title out of the plaintiffs.

If Lambert 1st died in possession owning the premises, then the only way in which the plaintiffs could claim would be as his heirs at law. But defendant Adam (as well as numerous other persons) was, also (in such case), his heir at law, and the parties would be tenants in common, and the plaintiffs would not be entitled to recover at all without showing an ouster by their co-tenants, which would not be presumed; and if they did recover they would be entitled to only a fractional proportion of the premises, instead of the entire tract which they in fact recovered at the trial. Moreover, I think so narrow, and far from obvious a ground for the exclusion of apparently proper evidence, should have been mentioned at the trial, to the end that the party ruled against might have had an opportunity to obviate the objection by other evidence.

Again, it is now urged, but without ever having been suggested on the trial, that this will neither devises nor assumes to devise the premises in question. I should be strongly inclined to adopt the contrary view, that it was assumed at the trial, and therefore must be taken for granted here, that it did not dispose of the premises in question. I am aware that there is proof in the case tending to show that one of the defendants admitted that the crazy Adam deed (which related to the same premises as did the will) "was of no use against the Enders, *because it related to the woodland*" (a different tract); but there is, on the other hand, much evidence tending to show that it *did* relate to the premises in controversy, and it was, therefore, a question to be submitted to the jury. The witnesses (several of them) show that the premises in controversy are lot No. 110 in Morris and Coyeman's patent (the woodland lying in the Sternbergh patent), and several others testify that the mother

of Lambert 2nd (the devisee) lived on the farm in question, which satisfies the words of the devise, which are: "I give unto my grandson, Lambert Sternbergh, three hundred acres of land, *which his mother now has in possession*, or two lots." There can be no question that there was enough, at all events, in favor of the defendants' location of this tract to draw the question to the jury. In any aspect in which I am able to consider it, I am of opinion that one or more copies of the will were erroneously rejected.

I am not satisfied with that part of the charge which authorized the jury, in case Lambert 1st, the father of the testator, Adam, was originally the owner of the premises in question, to presume a conveyance from Lambert 1st to Adam, if they were satisfied from the evidence, that such conveyance had been made. There would seem to be a saving clause to the otherwise positive direction or authority of the court in the phraseology at the end of this sentence, but when we come to consider, as the case states, that "all the evidence upon which said charge was founded is set forth in the bill of exceptions," and on examining that evidence find no proof of any such conveyance, nor any tending to prove that one had been made, I think the remarks of the judge are exceptionable, and well calculated to mislead the jury. The judge had already told the jury, in effect, that the death of Adam in possession implied title in him at his death, because he had said that the will of Adam, if he died in possession, *prima facie*, gave title to the plaintiffs, which I think was as far as he was authorized to go. To encourage the jury to go further, and presume, in the absence of evidence and against evidence, a conveyance from the father to the son, when it was a disputed question before them whether the father or the son was in possession, and there was much evidence tending to show that the father was, at the time of his death, one year after the son's death, and the father had made a will (or there was evidence tending to show that he had), disposing of the property in question, was but stimulating them to indulge in the loosest presumptions;—in the first place, to presume title in fee in Adam, from the fact of possession at his death; and, if he was not in possession, to presume a conveyance from his father to Adam in order that Adam's

will might take effect. The rule on the subject is carefully and, I think, well stated by Chief Justice TINDAL in Doe *v.* Cooke, 6 *Bingh.* 174, 179: "No case can be put in which any presumption has been made, except when a title has been shown by the party who calls for the presumption, good in substance, but wanting some essential matter necessary to make it complete in point of form. In such case, when the possession is shown to have been consistent with the fact directed to be presumed, and in such case only, has it ever been allowed."

There are subordinate questions in the case, which I do not deem it necessary to examine, and if I am right in the conclusion thus far arrived at, they are wholly unimportant to be considered.

I think the judgment of the supreme court was erroneous, and should be reversed; and that a new trial should be granted, with costs to abide the event.

DENIO, Ch. J.—I am of opinion that, upon the evidence which was given respecting the will, of which a copy was offered in evidence, and upon the proof which was proposed to be given and was rejected, the copy should have been received. I do not perceive why, upon principle, secondary evidence may not be given of a document which has been accidentally lost or destroyed, without the fault of the party offering it, although such document was one which, from age or other circumstances, proved itself, instead of being authenticated by ordinary proof of its execution. The law regards an ancient deed or will which has been kept in the proper custody, and where the possession and enjoyment of the property devised or conveyed has corresponded with the dispositions of the instrument, as *prima facie* an authentic document. So far as its consistency as a piece of evidence is concerned, it stands on the same footing as an instrument duly proved or acknowledged. If a paper, the execution of which can be proved, is lost or destroyed, a party interested under it may, from the necessity of the case, prove what it contained, and avail himself of it as though it had been produced. But if, instead of being capable of proof, by bringing witnesses to its execution, it be shown to be a paper which, under the circumstances appearing in evi-

dence, proved itself, and did not require the production of witnesses to its execution, the reason for admitting secondary evidence of its contents would appear to be equally strong as in the other case. So far as the evidence of antiquity arising from the appearance of the paper is material, the party would have to supply it by oral testimony from one who had seen it. No doubt it would be more satisfactory to have the paper to produce before the court and jury, but where this cannot be done, the same principle of necessity which admits secondary evidence of its contents, would allow proof of its general appearance, and of the marks of antiquity which were apparent upon it.

To show the reasonableness of this position, suppose an ancient deed or will to have existed down to a very late period antecedent to the trial, and to be accompanied with all the circumstances required to admit its reception without proof of its execution, and then that it was accidentally burned up. No one, I think, would claim that the party interested under it would forfeit his rights by being precluded from giving secondary evidence of its contents.

The evidence to bring this will within the rule was in my opinion sufficient. It purported to have been duly executed and attested; it was found in the hands of a descendant of the testator, who was also a descendant of one of the executors; it was, therefore, found in proper custody. The paper was about eighty years old when it was destroyed, and it had all the appearance of age which a paper which had existed so long would be expected to have. The premises in controversy had been held in consistency with its dispositions. Lambert Sternbergh, the grandson of the testator, to whom it was devised, entered into possession of it as soon as he came of age, previous to which his mother, who was his natural guardian, and her husband, had been in possession. This is precisely what would have happened if the will were a genuine paper. The alleged will also devised land to all the testator's children, and among them to his son Abraham, and a daughter of this Abraham was examined by the defendants, who offered to prove by her that her father acquired real estate under the will of his father, the testator, in the alleged will; but this was rejected. In testing the question we must consider that the offered evidence would

have been given had it been allowed. In addition to this, a very explicit act recognizing the will as an authentic one was shown by the production of the deed from Adam Sternbergh, to Lambert, the grandson of the testator. This deed was executed seventy-two years before the trial and only about twenty years after the date of the alleged will, when the disposition which the testator had made of his property must have been known and remembered among his numerous family. Both parties to it were the descendants of the testator, and the grantee a devisee under the alleged will, the grantor being his grandson and his heir at law, and the grantee also a grandson and the devisee of the premises in controversy. The deed refers to the will accurately by its date, and it moreover recites one of the disposing clauses in *hæc verba*. This proof, taken together, appears to me to have been quite sufficient to warrant the reception of the will in evidence as an ancient will within all the cases. The evidence of its destruction and of the accuracy of the copy offered in evidence was entirely satisfactory. It follows that the ruling, by which it was excluded when offered, was erroneous.

It is a much more difficult question whether, considering the course which the trial subsequently took, the error was at all material. The deed from Adam Sternbergh, the grandson of the testator and his heir at law, to another grandson, Lambert Sternbergh, under which the defendants claim title, to which I have just referred for another purpose, was sufficient to carry to the grantee the title to the premises, on the assumption that Lambert (the elder) died intestate as to his property, either wholly or in respect to the reversion expectant on the death of Lambert, the grandson. Hence, it is urged, with some reason, that if Lambert Sternbergh (the elder) died seized of the premises, the defendants made out a title to them under the deed of his heir at law, and thus the existence of the will became of no direct importance. If there had been any question of fact to submit to the jury respecting the deed, it could have been answered that the defendant should have been permitted to show both branches of his title; but upon the facts proved there was no such question. There was no answer to the defendants' title under the deed, provided the elder Lambert Sternbergh

died seized, and if he did not, the will could have no operation.

The plaintiffs claim under the will of Adam Sternbergh, one of the sons of Lambert (the elder), executed in 1763. He, Adam, died the next year, and his father survived him, and died in 1765; having made his will, according to my view of the evidence, in January of that year. The will of Adam, in its general terms, embraced the premises, provided the testator was entitled to devise them, and under that will the ancestresses of the plaintiffs took a vested remainder subject to the life estate devised to Lambert, his son. The real question in the case, therefore, was, whether Adam was seized of the premises at the date of the will and at his death. If he was, the plaintiffs' title was complete, but otherwise they had no pretense of title. No paper title in him was attempted to be shown. But possession of a person with a claim of ownership is *prima facie* evidence of title, and possession alone, without anything to qualify it, would be presumptive evidence of title. After such a length of time no living witness can speak as to the fact of possession of his own knowledge, and I think there is no rule admitting hearsay upon such a question.*

The premises in question appear to be embraced in two deeds, executed respectively by Philip Schuyler and others, and by Cornelia Schuyler and others, to Lambert Sternbergh, the elder, in 1754, eleven years before the death of the grantee. The title is not traced further back, nor is there any direct evidence that the grantee entered under the conveyances. If the copy of his will had been admitted, an authentic assertion of ownership on his part would have been shown, within about ten years from the execution of the deeds to him. The lands in question, among others, were specifically devised by that will to his grandson Lambert. It is unimportant to consider whether the want of technical words of inheritance would have limited the devise to an estate for life, because if the elder Lambert was the owner at the time of his death, the plaintiffs would have taken nothing upon his intestacy as to the reversion. There is no competent evidence that Adam, the son of Lambert

* On this compare the further decision, p. 52 and p. 53 of this vol.

1st, ever had possession of the premises. It is, however, probable; for his widow, after his death, and at the time of the death of the wife of his father, was in possession, as appears by the will itself. But this same evidence, which shows her to have been in possession at that early period, also shows, argumentatively, that the possession was in subordination to the title of her husband's father; but in the same instrument he disposes of it to her son, the second Lambert; which he would have no right to do if her husband had died seized.

There was much evidence of the declarations of Lambert 2nd, as to his title to the premises. He undoubtedly often admitted in substance that he held under the will of his father, which gave him only an estate for life, with remainder to his sisters, under which the plaintiffs claim; but he also sometimes claimed that his father did not own the land, and that *he* held it under the will of his grandfather. The declarations of Adam, the defendant, and his desire, and that of his sons, the other defendants, to conceal the will of the elder Adam, were entitled to little weight, as neither he nor they could have known anything respecting the source of title of Lambert 2nd. The will of the elder Adam is not in any respect hostile to that of his father, the first Lambert. It does not devise the premises in question specifically, although it embraced them if he owned them. If he did not own these premises, it took effect only upon his other lands; and it is clear that he was seized of other real estate, probably in large quantities, as he was or had been joint patentee with his father of three thousand acres in the Sternbergh patent. The will of the first Lambert is an assertion of dominion over the particular premises in question, and the will of his son Adam is not hostile to that assertion, as the devise is general, and, in effect, residuary, and does not assert a right to dispose of these or of any particular lands. These remarks are not made with a view of examining the verdict of the jury, but in order to test the materiality of the evidence excluded, and to try the correctness of the charge.

As an historical problem, I should consider the probability to be that Adam was in possession of the premises without title, but with the permission of his father, and that the latter, after his son had died before him, elected to devise the prem-

ises to the only son of his deceased son. I am inclined to the opinion that the excluded will was competent upon the question of ownership or seizin between this father and son, considering the obscurity of the other evidence and the great length of time which had elapsed It was a strong assertion of ownership, and should have been considered in connection with the other proof. I think that part of the charge of the judge was erroneous in which he instructed the jury that if Lambert, the father of the testator Adam, was originally the owner of the premises in question, the jury might presume a conveyance from Lambert to Adam, if they were satisfied from the evidence that such conveyance had been made. There was no evidence that Adam possessed the premises for any considerable length of time before his death, if he was in possession at all. After his death and the death of his father, which soon followed, possession of his widow and of her second husband was as consistent with the suggestion that the land had always belonged to Lambert, the father, as that he had conveyed it to his son. There was then really but a short possession, if any, upon which to base the presumption. To presume a deed under such circumstances would be mere conjecture, not warranted by any principle of law.

I am in favor of reversing the judgment and granting a new trial, for the error in excluding the copy of the will and for the error which I have pointed out in the charge.

All the judges except DAVIES and WRIGHT, JJ., concurred.

Judgment reversed, and new trial ordered, costs to abide event.

Second appeal: March, 1869.

On the second trial the will of Lambert 1st was admitted in evidence. At the close of the testimony, the details of which are stated in the following opinions, defendant requested the court to decide that as the case stood the title was in Lambert 2nd, and that there was no proof that Adam ever had any title, and so direct a verdict for the defendants.

A verdict for the defendants was directed, in accordance with

this request, and the judgment thereon was affirmed by the court at general term; that court being of opinion that there was no positive evidence that Adam Sternbergh ever was in actual possession, for no living witness testified to that fact, and plaintiffs' case, so far as it established possession, rested entirely upon the parol declarations of Lambert 2nd, while in possession, tending to show that he had a life estate, and that his father was in possession while living, and on defendants' similar declarations, and some trifling hearsay evidence; that confessions are to be regarded with caution, and that these were not sufficient to establish that Adam Sternbergh was in possession as owner, or that plaintiffs had title; and this conclusion was thought to be supported by the latter part of the opinion of DENIO, Ch. J., above reported. The opinion of the supreme court is in 52 *Barb.* 222. From this decision plaintiffs appealed.

Lyman Tremain, for plaintiffs, appellants.

Amasa J. Parker, for defendants, respondents.

BY THE COURT.—HUNT, Ch. J.—Adam Sternbergh died in 1764, leaving three children, a son Lambert, a daughter Catharine, a daughter Elizabeth. These daughters married respectively William Enders and Jacob Enders. The plaintiffs are the descendants of these daughters. The defendants are descendants of the son Lambert. The plaintiffs claim that Adam Sternbergh was the owner and was in the actual occupation and possession of the premises in question for some years prior to his death, which occurred in 1764, and so continued until his death. They claim that Adam made a will by which he devised the use of these premises to his widow until Lambert should reach the age of twenty-one, then to Lambert for his life, after his death to his two daughters Catharine and Elizabeth in fee.

The defendants claim that Adam never was the owner of the farm, but that it belonged to his father Lambert 1st, that it was given by his will to Lambert 2nd, and that this title was confirmed by a deed from Lambert 2nd to Adam, the first-born son of Jacob, the first-born son of Lambert 1st. The premises

are sixty acres in the Morris and Coeyman's patent, and are usually termed "The Flats." The judge directed a verdict for the defendants, on the ground that there was no proof that Adam ever had title, refusing the request of the plaintiffs to go to the jury on this question. If there was error in this respect a new trial must be ordered.

The inquiry on this branch of the case, is whether the plaintiffs produced evidence which established a title in Adam S., either *prima facie* or conclusive; that is, enough to entitle them to go to the jury on the point. The first witness, Maria Brownell, testified that she was a granddaughter of Lambert 2nd, that she lived and was brought up on his homestead farm, the premises in question, until her twenty-fifth year, that Lambert died in 1829, and occupied the farm until his death. She further testified that Lambert told her that he held the land under the will of his father Adam, that all the title he had was under that will, and that on his death the title would go to Catharine and Elizabeth; and that he then produced and showed to her his father's will, which was the one produced in court. That will was dated and executed October 17, 1763, and provided among other things that his wife Sophia should hold and possess all his lands and tenements for her own use, until Lambert should come to the age of twenty-one years. He then gave to Lambert all his real estate except his wood lot, during his natural life, and after Lambert's decease, "then to befall to my two daughters Catharine and Elizabeth, their heirs and assigns forever."

To each of said daughters was also given the sum of eighty pounds to be paid by Lambert. This witness further testifies that Lambert said that his sisters Catharine and Elizabeth would have the property on his death in case they got the will. The evidence of the declarations of Lambert was objected to in due season.

Henry Loucks testified to declarations of Lambert to the same purport, and testified that the buildings were on the Morris and Coeyman's patent.

Jacob Becker proved that after Adam's death his widow married one Dominick, that they resided there upon the farm until Lambert became of age, and that Dominick had to leave

after Lambert became of age. He also proved that Adam S. was reputed to be a large landholder. This evidence of Becker was received without objection.

Amy Underwood also gave evidence (under objection) of a declaration of Lambert some thirty-six years before the trial, to the effect that the property belonged to his sisters after his death.

Alvah Brownell testifies to various devices among the defendants to conceal the knowledge of Adam's will, that the will was delivered and was kept by him some time for that purpose. He also testifies that he examined the old papers of the defendant Adam (son of Lambert 2nd), and found among them a receipt given by one of Lambert's sisters, or her husband, for the legacy of eighty pounds, left by the old will of Adam Sternbergh. The evidence of this witness was given and received without objection.

Jacob Stoner testified without objection, that he had heard Adam, one of the defendants, say, that the Enderses claimed the farm he resided on, after the death of his father Lambert; that Adam said that William A. Enders said to him, Adam, that if he would help him out of debt, he would sign off his right to the farm he lived on and never call on him for it again. He also testified without objection, that he heard Lambert say that his, Lambert's, father lived and died on the premises on which he, Lambert, was then living, and that his mother afterward married John Dominick for her second husband.

Alvah Brownell being again examined, testified to the particulars of the papers of Lambert that he had found upon the examination referred to by him. He further stated that the defendant Adam had said to him that his grandfather Adam had died seized and possessed of the premises, on which Adam, the defendant, then lived, and that if the Enderses got hold of the old will he would be ruined; that Adam was aware of the contents of the old will and took measures to prevent Mr. Gebhard from giving information to the Enderses respecting it. This evidence was given without objection.

Catharine B. Gay testified that Lambert 2nd was her great-uncle, and that on the occasion of a visit to him she expressed her sorrow at his sickness, to which he replied "that I must

not be sorry for him, as he was an old man and at his death my father would be made rich and wealthy." "He also stated that there was a will in a chest in the room, to which he pointed, that will make my father's family rich after his death, &c.; that my father would be able to return and live happy here, &c., and that this farm comes to the Enders family after his death, by the will."

This evidence was given without objection. Theodore Barton and Samuel B. Stephens, Wm. Enders and Wm. Goeter gave similar testimony. A letter from one of the defendants to Alvah Brownell was given in evidence entreating him not to allow the Enders party to have his testimony.

A patent from the State to Lambert and Adam Sternbergh, dated 1754, conveying three thousand acres of land, was given in evidence by the plaintiffs. The plaintiffs gave further evidence and rested.

Whereupon the defendants moved for a nonsuit on the ground that no title was proved in Adam, the testator, which was refused, and they then gave evidence on their own part.

They gave in evidence certain ancient deeds from Philip Schuyler to Lambert Sternbergh, dated July, 1754, and from Cornelia Schuyler to the same, dated June, 1765, to which various objections were made; also a deed from John Dominick and Sophia, his wife, to Lambert, dated December, 1790, reciting that they were possessed of three certain lots, 11, 12 and 13, in the three thousand acre tract, granted to Lambert and Adam in 1754, and making partition of 12, 13 and a small piece off the southerly end of lot 11, and a small piece of lot 10 to Lambert. (The premises in question are lot 110, the northerly end of which buts against the southerly end of lots 10 and 11.)

The will of Lambert, the patentee, was proved by copy as a lost or destroyed document, in which, among other things, he gave to his grandson Lambert, "three hundred acres of land, which his mother now has in possession, or two lots." Also, "to Abraham and David, this farm on which I now dwell, but Nicholas must have the third part of the land over the creek and his new dwelling place."

Francis Dominick was sworn for the defendants, and testi-

fied that he was the son of John and Sophia Dominick, and that his mother was the widow of Adam Sternbergh, and that he was half brother to Lambert 2nd; and that as soon as Lambert became of age his father and mother had to leave the farm, and that Lambert remained there until he died. He further testified that Lambert told him the property belonged to him; that there were two wills made, and that the last one gave it to him. This evidence was objected to by the plaintiffs' counsel.

Lewis Roach testified to the declarations of Lambert that he owned the farm, and that he got it from his grandfather. The same thing was shown by George Cook, Abram Ackerman and Adam Sternbergh, by whom, also, evidence was given showing the relative situation of the lots in the different patents with reference to each other. The defendants closed their case.

Plaintiffs then gave evidence tending to show that the Albany [or Schuyler] deeds were obtained many years after the death of Lambert, the grantee in the same, and that they were fraudulently obtained through a person having access to the papers of Mr. Bleecker.

The defendants then asked the court to decide that the title was in Lambert; that there was no proof that Adam ever had title; and to direct a verdict for the defendants.

The court acceded to this request, and did so order and direct, to which the plaintiffs excepted. The plaintiffs asked that the case be submitted to the jury, which was declined; also, severally, that the question as to the Schuyler deeds, and the will of Lambert Sternbergh, also as to whether the devise therein covers the premises in question; and also as to whether Adam Sternbergh died seized of the lands, and certain other questions, should be submitted to the jury. Each of these requests was denied by the court.

I have examined the opinions rendered in this case, when in this court on the former argument, and find that the decision determined only the questions relating to the admission of the will of Lambertus, the patentee.*

The judgment at the circuit, on the trial which we are now

* Above, pp. 35 and 42.

considering, was affirmed at the general term, on the ground that the plaintiffs had failed to show title in Adam Sternbergh. I agree that the plaintiffs' right of recovery rests upon the ownership of Adam Sternbergh. Was there evidence on which the jury would have been justified in finding that Adam was the owner of the premises?

Lambert's own declarations while in possession of the premises were proved on this subject. I have already quoted some of them.

The defendants claimed under him as his heirs and devisees. They had no title except as derived from him. His declarations were evidence against them. Pitts *v.* Wilder, 1 *N. Y.* 525; Hunter *v.* Trustees of Sandy Hill, 6 *Hill*, 407; Spaulding *v.* Hallenbeck, 35 *N. Y.* 204; 1 *Greenl. on Ev.* §§ 108, 109, 189.

I have cited the evidence that Lambert declared that all the title he had to this property was under the will of his father, and that it would belong to the Enders family at his death.

It was proved by Dominick that his mother and stepfather occupied the farm until Lambert became of age; that when he became of age they and their family were compelled to leave the property, and that he, Lambert, entered into its possession, and so continued until his death. This is in precise accordance with the terms of Adam's will, and is strong evidence that all parties then recognized Adam's ownership and the validity of his will, and acted under its provisions. It carries strong weight upon the proposition that Adam's ownership and authority to devise were then admitted by all, as well those injured as those benefited by its terms. Lambert stated in express terms to Mr. Brownell, that his father, Adam, died seized and possessed of these premises; this was *prima facie* evidence of seizin. Jackson *v.* Waltermire, 5 *Cow.* 299; Embree *v.* Ellis, 2 *Johns.* 119, 123.

The defendants themselves, from time to time, made similar admissions as to Adam's ownership and the source of their title.

It is quite true that Lambert is proven to have made different statements at other times, and that the defendants endeavored to avoid the effects of their admissions. I do not stop to consider whether such declarations are competent. Assum-

ing them to have been competent, they raised a question for the jury, but gave no power to the court to disregard those of the opposite character. The case should have been submitted to the jury upon this point. Especially should this view be taken, when we recollect that there were then no such laws or facilities for recording titles as we possess now.

Again: how was this proof of title derived from the seizin of Adam and the holding of Lambert under this will disposed of? Chiefly, I judge, by the effects of the deeds from Schuyler. I do not assume to pass upon their effect. It is safe, however, to say that there was evidence on which the jury might have found that they were not delivered until many years after the death of the grantee named in the same; and that they were surreptitiously obtained from the office of Mr. Bleecker. I by no means intend to say that the jury would or should have so found; simply, that there was evidence which would have justified such finding, and that the question should have been submitted to them. If so held, their effect would have been entirely destroyed. There is no evidence, that I can discover, that the grantors in those deeds were either the owners or ever had been in possession of the premises described in those deeds. Adam being in possession, could not have been ejected upon such evidence of title. Gardner *v.* Heart, 1 *N. Y.* 528.

Again: effect is attributed, in favor of the defendants, to the will of Lambert 1st, and the deed of his grandson Adam, son of Jacob, confirming the same. Assuming that Lambert had title, great effect might well have been given to the claim under his will. So, as there was doubt about the quantity of estate to pass under the will, by reason of the absence of words of inheritance, it was quite proper that the deed from Adam, the grandson of Lambert the 1st, to Lambert, should be introduced. If Lambert was the owner, and the fee did not pass by the devise, it descended to his eldest son Jacob, and thence to Jacob's eldest son Adam. All this, however, depended upon the question whether Lambert himself had the title.

Again: the land described in the will of Lambert 1st, was by words of general description, "three hundred acres of land which his mother now has in possession, or two lots." He had in the previous paragraph twice used the word "dwelling place" in

reference to other pieces of land. Did he intend here to use a new word for the same idea, or did he mean in possession but not occupied as a dwelling place?

Again: as a legal proposition how was this three hundred acres, thus described, to be located? The defendants say that it covered the sixty acres in Morris and Coeyman's patent. The plaintiffs say that it meant to describe land on the hill, in the Sternbergh patent, which Lambert 1st and his son Adam owned together. For this view they claim to find confirmation in the releases executed after the death of Lambert 1st between the different members of the family, and in the fact that the number of acres cannot be correctly made out in the Coeyman's patent and adjoining. It was also proved that on two several occasions, the defendant Adam stated that this description related to the low land only and did not include the premises in dispute. This location was a pure question of fact, which should have been submitted to the jury. It should not be forgotten, also, that Lambert 2nd, who finally made the claim of title under the will of Lambert 1st (as do the present defendants), did, at one time, claim under a second will from his father as well as upon the one now in evidence. He placed his title at one time upon the will of his father, as it now appears giving him a life estate only,—at another time upon a second will, which gave him the absolute title,—at another upon the title obtained from his grandfather. These contradictory claims were proper for the consideration of the jury in seeking to determine the true ownership of the premises in dispute.

I think a new trial should be ordered. Costs to abide the event.

LOTT, J., delivered the following opinion.—The action was brought to recover the possession of two tracts of land lying in Schoharie county, one of them in the Sternbergh patent, containing one hundred and six acres of land, and the other in Morris and Coeyman's patent, containing about sixty acres.

The issues therein were tried by Justice INGALLS and a jury, and he, on the closing of the testimony, directed a verdict for the defendants, and the case comes before us on an appeal from

the judgment of the general term in the third judicial district sustaining that direction (52 *Barb.* 222, Justice HOGEBOOM dissenting), and an accurate statement of the material facts, so far as they are undisputed, and a careful analysis of the evidence bearing on the matter in dispute, are contained in his dissenting opinion.*

A careful examination of the testimony has brought me to the same conclusion he arrived at.

It appears that Adam Sternbergh, under whom the plaintiffs claim title, and his father, Lambert, owned a tract of woodland in the Sternbergh patent, and he, by his will, dated October 18, 1763, directed his wife Sophia to sell his right therein, and to receive the money for the same to her own use forever, and he gave all the residue of his real estate to her, until his son Lambert (called Lambert 2nd in the case) attained the age of twenty-one years, and then to him during his natural life, and after his decease to his two daughters Catharine and Elizabeth (who were the ancestors of the plaintiff in this action) in fee. The testator died on August 12, 1764, aged 38 years. No deed or grant to him of any real estate, other than the woodland, is shown, and there is no positive or direct proof that he was in possession of any. He was, however, reputed to be a large landholder, and a patentee in other patents, and his widow Sophia, shortly after his death (as early as January 7, 1765, the date of his father's will hereinafter mentioned), occupied the premises in question, and continued in the occupation thereof until Lambert 2nd, his son, became of age, who then entered and continued in possession until his death, in 1829. He, while in possession, frequently stated in substance that he held it for life under his father's will, and that upon his death his sisters Catharine and Elizabeth would have the property.

There was also evidence showing an admission by the said Lambert 2nd, "that his, Lamberts', father lived and died on the premises on which he said he, the said Lambert, was then living," and one of the witnesses says that Sternbergh (a son of Lambert 2nd), one of the defendants, told him, in 1846 or 1847, on being asked "whether there were not any old deeds among

* That opinion is not reported in 52 *Barb.*

his or his father's old papers showing that the property had been devised by Adam Sternbergh, Sen., the grandfather of Adam Sternbergh, defendant, that it would be well enough to look them over and see, but he was sure there were none of his grandfather's deeds among them, for his, defendant's, father, Lambert, had always told him that he had put them out of the way or destroyed them," and that same witness testifies that he had been told by the said Adam Sternbergh, defendant, "that his grandfather Adam died seized and possessed of the premises on which Adam, defendant, then lived."

Another witness stated that the said defendant, Adam Sternbergh, on being asked if there were any other papers than the said will by which he held the property, replied "that his father had said there had been other papers to show that his grandfather, Adam Sternbergh, owned the flats, but they were destroyed."

The property above referred to as the premises on which the said Lambert 2nd and the defendant were living, and the flats, are the premises, or at least a portion thereof, in controversy in this action.

It was also shown by the plaintiff, (although not material in making out his cause of action in the first instance), that the widow of Adam Sternbergh, the testator, after his death intermarried with one John Dominick, and that the brothers of the testator, by deed dated July 20, 1768, quit-claimed to him with other lots and parts of lots, lot No. 10, and also one-third part of lots Nos. 11, 12, and 13, in the Sternbergh patent, containing three hundred acres ("the said above mentioned third part containing one hundred acres") and that the said Lambert Sternbergh by deed bearing date December 3, 1790, after reciting that he and the said Dominick and wife held those last mentioned lots as tenants in common, and had agreed to make a division thereof, and that lot No. 11, containing one hundred acres, was allotted in severalty to the said Dominick and wife as their part and share, then released and quit-claimed the same ("only excepting a small piece of land on the northerly end of the said lot No. 11, which is lying from the top of a rock of a hill, and adjoining with the other end to a tract of land known as the Morris and Coeyman's patent"), to them in fee.

This was substantially the plaintiffs' case when they rested. It was in my opinion clearly sufficient to warrant a jury in finding that Adam Sternbergh, the testator, was in possession of the premises in question at the time of his death, and that Lambert 2nd held possession under his will. Such must have been the opinion of the justice who held the circuit, for it is shown by the case that when the plaintiffs rested, the defendants' counsel "moved the court to nonsuit the plaintiff, on the ground that no title is proved in Adam, the testator, and from whom the plaintiffs claim title," and the motion was denied.

No paper title in the testator had been shown, and his devise to Lambert was not of this specific property in dispute, and the ruling of the court must have been based on the fact that the possession as proven was presumptive evidence of title in him.

It then becomes necessary to examine the evidence subsequently introduced by the defendants to see whether that justified a direction to the jury to find a verdict for them.

They introduced among other testimony the following documentary evidence:

1. Two ancient deeds from Philip Schuyler, and others to Lambert Starnenberg, dated July 22, 1754, for one-half of three lots in the Morris and Coeyman's patent, being No. 102, containing twenty acres, No. 104, containing forty-one acres, and No. 110, containing fifty-four acres and two rods, and the other from Cornelia Schuyler and others, to the same grantee, dated June 22, 1755, for the other half of said three lots.

2. A will of Lambert Sternbergh (who I shall assume to be the grantee in the two deeds last mentioned, and who is generally called in the case as Lambertus and Lambert 1st), bearing date January 7, 1765, in and by which among other devises he made a devise in these terms: "Also, I give unto my grandson, Lambert Sternbergh, three hundred acres of land which his mother now has in possession, or two lots."

3. A deed, bearing date May 17, 1785, from Adam Sternbergh, described therein as grandson and heir at law of Lambert Sternbergh, deceased (he having died on January 25 or 26, 1765), to Lambert Sternbergh, a grandson of the said Lambert, deceased, in which he, after reciting the terms of the devise in the will of his grandfather to the said Lambert above set forth,

that the said devise was intended to vest an estate in fee simple, but by operation of law only passed a life estate, and that the inheritance would on his death vest in the said Adam as heir at law, then grants and conveys "the reversion and inheritance of the lands devised or intended to be devised to the said Lambert, and every part and parcel thereof" to him in fee, but without any specific description thereof.

4. A deed bearing date December 3, 1790, from John Dominick and Sophia, his wife, to Lambert Sternbergh. This deed bears even date with the deed from him to them mentioned in noticing the plaintiffs' proofs, and contains a recital of the ownership by the parties of the said three lots, Nos. 11, 12 and 13 in the Sternbergh patent, an agreement to make partition and division thereof and an allotment of said two lots Nos. 12 and 13, and a small piece of the southerly end of lot No. 11, and also a small piece of lot No. 10, in the said patent, containing in all two hundred and ten acres, as the part and share of the said Lambert, and then releases and confirms the same in severalty to him, and they are stated in the case to embrace all the lands described in the complaint as being in the Sternbergh patent, and it is shown that the other lot in question is No. 110 in the Morris & Coeyman's patent.

The defendants also proved by several witnesses that Lambert 2nd had made statements or admissions to the effect that he did not hold his property from his father "but from his grandfather; that his father died before his grandfather, and he never owned any land," and it was also shown by Adam Sternbergh, one of the defendants, who was seventy-eight years of age at the time of the trial in April, 1866, that the property so held by him contained originally about two hundred and nine acres in the Sternbergh patent, and sixty acres in the Morris & Coeyman's patent, and about forty acres in an other lot in that patent about a quarter of a mile distant from the other, that it was all worked as one farm, and had been since his earliest recollection, and that an old house which was torn down in 1803, stood on the sixty acre lot known as No. 110, that there were two lots of woodland in the Sternbergh patent of one hundred acres each, adjoining said lot No. 110,

and that they were "used for no other purpose than to get wood from."

Evidence was then given on the part of the plaintiffs, and Almerin Gallup testified, that the defendant Adam Sternbergh said in 1846 or 1847, that the deed of May 17, 1785, to his father Lambert 2nd from Adam Sternbergh, the grandson and heir at law of Lambert 1st, sometimes called crazy Adam, "only covered the woodland; the lands in the Sternbergh patent, commonly called the woodland," and "he made this further remark that if the Enderses got the old will in question, he would lose his farm on the flats," referring to the will under which the plaintiffs claim title.

Eliza Brownell, one of the witnesses examined by the plaintiffs before they rested, also testified that the crazy Adam deeds "had reference to the woodland only."

There were some declarations of Lambert 2nd also given in evidence to the effect that his father Adam had deeds of the farm on the flats, but that he had committed them to the flames and they would never see daylight again.

It may be proper to add that the lots in the Sternbergh patent appear to contain one hundred acres each.

Upon the close of this evidence the defendants' counsel asked the court to decide that the action could not be maintained; that as the case then stood the title was in Lambert; that there was no proof that Adam ever had title; and to direct a verdict for the defendants; and the court so decided and directed such verdict, which was then and there rendered.

The plaintiffs' counsel then asked the court to submit the case generally to the jury on the evidence, and upon that being refused, to submit to them separately whether the devise in the will of Lambert or the deed of Adam to Lambert covered the premises sought to be recovered or any portion thereof. All of which requests were refused, and proper exceptions taken.

The decision of the judge on directing a verdict, and the refusal to submit these questions to the jury, were based on the assumption that the title to all of the lands in questions passed as claimed by the defendants under the said last mentioned will and deed, and consequently all the declarations and statements of Lambert 2nd in reference to his possession and that

of his father had become immaterial and unavailing as against that title.

The proof in my opinion did not justify that assumption in reference to the lot in the Morris & Coeyman's patent, for the following reasons. The only evidence tending to show a title to those in Lambert are the Schuyler deeds, but they are insufficient for the following among other reasons. 1. It does not appear that they were ever delivered to him. They bear date, the first of them July 22, 1754, and the last June 22, 1755, and the grantee named therein is Lambert Starnenbergh. It is not shown that Lambert, the testator, was ever called by that name or that the Sternbergh family were ever so called or designated. Conceding, however, that the names are the same, I think we are warranted in assuming that it was a common family name; there appear to have been sons of that name in at least three generations, and as the will of Lambert, the said testator, bears date January 7, 1765, and he died in the same month, it appears that more than ten years intervened between the date of the first of those deeds and that of the will. The mere fact of the name of the grantee and that of the testator being the same, is of itself, therefore, of little importance. It does not show that he was the party designated.

If the deeds had been found among his papers after his death, a delivery thereof might have been presumed to have been made to him, but nothing of that kind is shown; on the contrary, the only evidence bearing on that question is adverse to such presumption, and tends to show that they were not in existence at his death.

2. It is not shown that the grantors ever owned or had any interest in those lots or had possession of them.

3. It does not appear that Lambert, the testator, ever was in possession of those lots or exercised or asserted any acts of ownership over them.

The devise to his grandson Lambert 2nd cannot be construed into an assertion of a right or a claim thereto. It is in general terms of "three hundred acres of land which his mother now has in possession or two lots," and not those specific lots or by any description that necessarily includes them. The only means of locating the property is by ascertaining what land

then belonging to the testator was in the possession of the grandson's mother. The evidence tends to show, and indeed, all the parties substantially concede, that she was at that time in the occupancy of two lots in the Morris and Coeyman's patent, No. 110, on which the dwelling-house stood, and another lot of forty acres about a quarter of a mile distant therefrom together with three wood lots in the Sternbergh patent, adjoining lot No. 110, of one hundred acres, and that the whole thereof was used and occupied by her as one farm. It is also fairly inferrible from the testimony that she, under the devise from her husband, held an undivided one-third part of the lots in the Sternbergh patent, and that Lambert 1st held the remaining two-thirds thereof.

We are, therefore, in giving construction to the devise under consideration, to look at the relation of the parties to each other, and the situation of the property then in possession of the mother, and we must assume that the testator intended to devise such land only, then in the possession of his grandson's mother, as he owned, or whatever interest he had therein; and the terms of the devise indicate that such was his intention. He does not describe the property as a farm or as all the lands in her possession, as he would have been likely to do if he meant to make a disposition of the whole of the land or the entire estate.

The language used by him is consistent with the theory that he intended to devise his share only of the three lots, Nos. 11, 12 and 13, in the Sternbergh patent. They were in possession of his grandson's mother and contained three hundred acres, and when he gives to his grandson "three hundred acres of land which his mother has now in her possession, *or two lots*," it appears to me that the terms of the devise may be fairly and reasonably construed to mean his interest in the three hundred acres which was equivalent to two lots. He evidently intended by the alternative clause, "or two lots," to make some qualification or explanation of the previous terms, and when we take into consideration the nature and extent of his interest in those three lots, his devise properly applies to that and to that only. It would be doing him injustice to say that he intended by it to give what did not belong to him, and as its terms admit of a

construction limiting and restricting it in its operation and effect to the lots in the Sternbergh patent, we cannot properly extend them to property not owned by him.

There are some other facts showing the propriety of such a limitation and restriction. The two lots in the Morris and Coyeman's patent are spoken of by the witnesses as together containing one hundred acres.

The testator cannot be presumed to have referred to them when he speaks of the quantity of the land given as three hundred acres, nor would he have restricted or qualified those terms by saying, "or two lots," if he meant to devise the three lots in the Sternbergh patent or his interest therein as well as those in the other patent.

It is also proper to say in this connection that the declarations of Lambert 2nd after he took possession on becoming of age, that he held under his father (assuming them to have been made), tend to confirm the views above presented.

My conclusion, therefore, is that there is nothing in the terms of the will, or appearing in the evidence, that warranted the assumption that any property in controversy except that in the Sternbergh patent ever belonged to Lambert, and it follows that the verdict, if based on that ground alone, was improper.

It was, however, urged as an additional ground, that there was no proof that Adam ever had title. I have shown that when the plaintiffs rested the case there was sufficient to call for the verdict of the jury on the question of Adam's possession.

The testimony subsequently introduced, while it tended to show that Lambert 2nd sometimes claimed under his grandfather's will, also tended to establish title in Adam by declarations to the effect that he had deeds of the property which had been destroyed.

The court, in this conflict of evidence, could not properly decide that the plaintiffs had shown no title.

In conclusion I will remark that the question decided on the former appeal in this case, were not the same as those on the present. The opinion of both the judges then given show that the decision was based on the ground that the will of Lambert

1st had been improperly excluded, and that the judge erred in instructing the jury that if he was originally the owner they might presume a conveyance from him to Adam his son.

The result of these considerations is, that the direction of the judge to the jury at the circuit, to find a verdict for the defendant, was wrong, and it becomes unnecessary to examine the various exceptions taken as to the admissibility of evidence.

The judgment of the supreme court should be reversed and a new trial ordered, costs to abide the event.

Judgment reversed and new trial ordered, costs to abide event.

ERICKSON *v.* SMITH.

June, 1869.

The rule that where a public officer may be required by law to make a return of his acts, a return made by him may be used as evidence of the facts therein stated, does not make a mere official certificate of inspection required by law, evidence of the matters which the inspector therein certified he was satisfied of, when such matters are drawn in question by a stranger.*

In an action for damages caused by a steamboat explosion, the certificate of the inspection of the vessel under the Act of Congress of 1852, is evidence that the vessel was inspected; but is not evidence of the other matters relative to the vessel which are stated in it.†

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* Consult alse Board of Water Commissioners *v.* Lansing, 45 *N. Y.* 19; Dubois *v.* Newman, 4 *Wash. C. Ct.* 74; Brown v. Galloway, *Pet. C. Ct.* 291; Huntley *v.* Donovan, 15 *Q. B.* 96; *Exp.* Church, 1 *Dowl. & R.* 324; Brown *v.* Thornton, 6 *Ad. & E.* 185; Kinneraley *v.* Orpe, 1 *Doug.* 56; Rex *v.* Mawbey, 6 *T. R.* 619; Waldron *v.* Coomb, 3 *Taunt.* 162. As to certificates not strictly official,—Blackburn *v.* Crawfords, 3 *Wall.* 175; Rex *v.* Bathwick, 2 *Barn. & A.* 639; Vaux Peerage case, 5 *C. & F.* 542; Dufferin, &c. Peerage, 2 *H. of L. Cas.* 47; Sewell *v.* Corp, 1 *Carr. & P.* 392; Matter of Klingemann, 11 *W. R.* 218; Abbott *v.* Abbott 29 *L. J. Matr.* 57; Drake *v.* Maryatt, 2 *Dowl. & R.* 696.

† As to the effect of the acts of Congress, in respect to the remedies in the State courts, see Landers *v.* The Staten Island R. R. Co., 13 *Abb. Pr. N. S.;* Baird *v.* Daly, 4 *Lans.* 426; Swarthout *v.* New Jersey Steamboat Co., 48 *N. Y.* 209; Chisholm *v.* Northern Transportation Co., 61 *Barb.* 363.

Erickson *v.* Smith.

The deceased was a passenger on board defendants' steamboat when the boiler exploded, and seeing the steam rush into the cabin, she ran out, and her body was subsequently found in the water. *Held*, that a medical witness who had examined the body, and testified that the death was caused by drowning, might properly be asked, what would have been the indications if a person had been suffocated first, and afterwards had fallen into the water, although there was no evidence that this was the fact.

William T. Erickson, administrator, &c., of Mary E. Erickson, sued David and Tunis Smith, in the supreme court, for damages under the statute, for injuries causing the decedent's death.

Defendants were owners of the steamboat Arrow, running as a passenger boat on the Hudson River. On August 5, 1855, a boiler flue exploded, and the deceased, who was among the passengers then on board, was terrified, and ran from her companions, and her dead body was afterwards found in the river. The theory of the defense was that she was not injured by the explosion, but madly rushed overboard and was drowned.

On the trial, a witness, Dr. Beach, who had been present at the coroner's inquest, testified that in his opinion the deceased died from drowning; his examination of the body was superficial; he did not find any evidence of scalding that he could swear to. He further stated that the body was much decomposed. There was an abrasion on the face, and the skin was easily peeled off; and that in his opinion there were scalds.

On his re-direct examination counsel were allowed to ask him under exception,

"What would have been the indications if a person were suffocated, and afterwards falls, or is thrown overboard?"

A. We should have similar indications as we would have from drowning.

On behalf of defendants, one Kraft, a United States inspector of hulls and steamers, was called as a witness, and was shown a certificate of the inspection of the steamer, under the act of 1852, signed by himself and Douglass, another inspector. The witness did not inspect the boiler, that was done by Douglass, who was not produced as a witness.

The court, JAMES C. SMITH presiding, admitted the certifi-

cate in evidence, as showing an inspection, but not as evidence of the facts recited in it, in this case against the plaintiff, except that the vessel was inspected. And upon the cause of death the judge charged the jury that if the deceased was scalded so severely as to cause her to apprehend that she was fatally injured, and being unable to bear the consequent physical anguish, she rushed overboard, impelled by a sudden and instinctive feeling that her suffering would thereby be lessened and relieved; or, if, under reasonable apprehension of immediate physical danger, in hearing the explosion and seeing the steam rushing into the cabin, where she was, she ran out of it, and in attempting to reach a place of safety she accidentally, or without fault on her part, fell overboard, they might find that the death was caused by the explosion.

The jury found for plaintiff three thousand dollars, and judgment was affirmed at general term, and defendants appealed.

Erastus Cooke, for defendants, appellants;—Insisted that the question put to Dr. Beach was purely hypothetical, and based on no facts; citing People *v.* Lake, 12 *N. Y.* (2 *Kern.*) 358; Dickinson *v.* Barber, 9 *Mass.* 227; and that the certificate was evidence of the facts stated in it, on which point he relied on the authorities cited in the opinion, and Milford *v.* Worcester, 7 *Mass.* 57

Ira D. Warren for plaintiff, respondent.

By the Court.—Daniels, J.—The questions presented for decision upon this appeal arise under the rulings of the court before which the trial was had, concerning the admission and rejection of evidence. The first of these in importance is that which related to the certificate of inspection of the steamboat on which the explosion took place. That inspection and certificate were made on June 25, 1855, and the explosion occurred on August 5, following. The steamboat was a passenger boat, and that circumstance, as well as the form of the certificate itself, indicate that she was inspected under the act of Congress, passed August 30, 1852, and not made under the act of 1838.

But whether it was made under one or both of these acts is

a matter of not the least importance upon the present occasion, because that does not affect the disposition of the questions raised upon the trial. The substantial reasons, if any exist, for allowing any greater force or effect to the certificate than it was allowed to have upon the trial, depend upon the act of 1852.

For under that of 1838, the inspectors were not required to ascertain, and certify to facts within their own personal observation, but were permitted to obtain them from other sources and then to embody them in their certificate. This was to contain a statement of the age of the boat, when and where she was built, and the length of time she had been running; whether in their opinion the boat was sound, seaworthy, and fit to be used for the transportation of freight or passengers, and whether in their opinion the boilers were sound and fit for use, to which was required to be added a statement of the age of the boilers. 5 *U. S. Stat. at L.* 305, §§ 4, 5.

From the nature of the duty imposed by this act, it is clear, that they were required to state no fact beyond that of inspection alone. For all the other matters required to be contained in the certificate consisted of the opinions of the inspectors concerning the condition of the boat and her boilers, and of facts necessarily derived from information acquired from other persons. And for these reasons it could not, when made, be competent evidence in an action between her owners and other persons in no way connected with the examination, inspection and certificate made.

But the act of 1852, is more comprehensive as well as more definite in its requirements. By that act the inspectors were to satisfy themselves that the steamboat was of a structure suitable for the service in which she was to be employed, and in a condition to warrant the belief that she might be used in navigation as a steamer with safety to life, and that all the requirements of the law had been complied with regarding fires, boats, &c. They were also required to inspect the boilers and subject them to the hydrostatic pressure prescribed, and to satisfy themselves by examination and experimental trials, that the boilers were well made, of good and suitable material; that the openings for passage the of water and steam respectively, and all pipes exposed to heat, were of proper dimensions and

free from obstruction; that the spaces between the flues were sufficient; that the fire line of the furnace was below the water line of the boilers, and that such boilers and machinery could be safely employed in the service proposed, without peril to life.

They were also required to satisfy themselves that the boilers, flues, and other machinery connected with them, in other respects, were in such a condition as to render them capable of being safely used in the business in which the steamboat was to be employed, and they were prohibited from approving any boiler or pipe made wholly or partially of bad material, unsafe in its form, or dangerous from defective workmanship, age, use, or any other cause. And after making such inspection in detail, if they approved of the steamboat, they were then required to make and subscribe a certificate to the collector of the district, in the form prescribed by the act. This certificate, enumerating and describing the boilers and machinery found on board the steamboat, and her accommodations and capacity, was also required to contain the statement that she was "in all respects staunch, seaworthy, and in good condition for navigation," and that it was their "deliberate conviction founded on the inspection," made by them, that she could "be employed as a steamer upon the waters named in the application [for inspection] without peril to life, from any imperfection of form, materials, workmanship or arrangement of the several parts, or from age or use." 10 *U. S. Stat. at L.* 61; Act of Aug. 30, 1852, *Id.* 63–65; 1 *Bright. Dig.* 849–853.

This inspection and certificate were rendered necessary for the purpose of entitling the masters and owners of the boat to the papers required by and enabling her to engage in the business of navigation under the laws of the United States (§ 1). And to that extent the certificate of act of 1852 (above), necessarily became conclusive upon the officer whose future conduct was required to be based upon it. But beyond the effect to be given to it, which must be implied from that circumstance, the act contains nothing giving it the nature or character of evidence, in controversies between the owners of the steamboat and third persons, involving the condition of her boilers and machinery.

As proof of the fact that the inspection had been made in the manner prescribed by the statute, and that the law so far had been complied with, it may very well be that it was competent evidence. And for that purpose it was received upon the trial of the present action. This was clearly the understanding of the court. For when it was alluded to in the charge, it was stated that it had been admitted for the purpose of allowing the defendants to show that they had caused the engine to be inspected, and the certificate to be given which the act of Congress required, in order to allow them to run the boat. Beyond that certainly, from the nature of the duties to be performed, and the form of the certificate required to be given, by the inspectors, its effect as evidence ought not to be extended. They were required to do certain things by way of performing their duties, and that they did them, and in the mode prescribed by the statute, presumptively followed from the fact of the inspection itself.

By allowing the certificate to be used as evidence of the inspection, and that the law in that respect had been complied with, the defendants had the benefit of the facts that the required inspection and examination had been made and the pressure applied, prescribed by the terms of the statute. But the statements made beyond that, of the general condition of the steamer, the conviction arrived at by the inspectors of the safety of the boiler and machinery, and the fact that she could be safely employed in her business as a passenger boat without danger or peril to life, were not evidence of facts, but mere inferences drawn from them by the inspectors, and for that reason were not evidence against the plaintiff. And this was the only restriction imposed upon its use as evidence by the court at the trial, if indeed, from the ambiguous and uncertain statement of the ruling contained in the case, even so much as that can be accurately said to have been done.

The statement of the ruling is, that the certificate was received as evidence showing the inspection, but not as evidence of the facts recited in it;—which was entirely accurate, whether it included more or less than has already been supposed to have been within the ruling; for it is very well settled that the recitals contained in an instrument are never evidence against

a stranger to it, as the plaintiff in this case most clearly was. 2 *Cow. & H. Notes*, 3 ed. 453, and cases there cited.

The authorities referred to by the defendants' counsel do not warrant the conclusion that this certificate should have had any greater force than was given to it as evidence upon the trial of this cause. The rule stated by *Starkie* (vol. 1, 173), is entirely unsupported by the case cited by him as sanctioning it. And he himself appears to have doubted its accuracy, for he has followed his reference to the case, on which he asserted it, with a query. Upon consulting it this case will be found to contain nothing whatever indicating the propriety of such a doctrine. See Brett *v.* Ward, *Winch*, 70. And the principle previously mentioned by this author is entirely at variance with any rule that would render this certificate evidence of the inferences and conclusions of the inspectors, or of anything beyond the fact that the inspection and examination of the boat had been made as the statute required that to be done.

For he says, "That neither the declaration nor any other act, of those who are mere strangers, or, as it is usually termed, any '*res inter alios acta*,' is admissible in evidence against any one, as affording a presumption against him, in the way of admission or otherwise. In general, it would be contrary to the first and most obvious principles of justice, that any one should be bound by the acts, or concluded by the declarations, or assertions of others to which he was in no wise privy. Hence it is that no man is bound by any decree or judgment as to any matter of private right litigated in a suit to which he was not privy." *Stark. on Ev.* part 1, § 32.

In the case of Clintsman *v.* Northrop, 8 *Cow.* 45, the question was not considered how far the act of the inspector of the leather was evidence against the defendant. But it was held that it was not conclusive, as the court upon the trial had held it to be. And that was all that was decided upon that occasion. And no more than that was decided in the case of People *v.* Peck, 11 *Wend.* 604. The decision was that the certificate was evidence, but to what extent it was deemed to be so was not stated. And, besides, the circumstances under which that certificate was made were more favorable to its admissibility as evidence than those which existed in this case. For when

legally and properly given, it necessarily constitutes the evidence contemplated by the statute of the election of the trustees. In the case of Jack *v.* Martin, 12 *Wend.* 311, the effect to be given to the certificate was expressly declared by the act of Congress under which it was made, and precisely that, and nothing beyond it, was given to it in that case. The cases of the United States *v.* Benner, 1 *Baldw.* 234; and The same *v.* Liddle, 2 *Wash. C. Ct.* 205, were peculiar and unusual. They involved the relation of certain foreign representatives to the government of the United States,—a fact peculiarly within the knowledge of the secretary of state and dependent upon his action. And for that reason his certificate that they had been accepted and recognized as such by the department over which he presided was held to be evidence of that fact, for it showed that to have been the act of the government required for that purpose.

Where a public officer may be required by law to make a return, and his acts included in the return afterwards become involved in controversy, there it may be used as evidence. But where no return is required by law to be made, the certificate of the officer is not evidence, either for himself, or in behalf of any other person not using it as an admission against him. The rule upon that subject has been stated to be that, "where the law has made it the duty of a public officer to make a return of his doings, and has made him responsible for the truth of his return, a return may be evidence." Stephen *v.* Clements, 2 *N. H.* 390, 391. And this principle has been approved in the case of Hathaway *v.* Goodrich, 5 *Vt.* 65; see also, Oakes *v.* Hill, 14 *Pick.* 442, 448. But the obligation imposed upon the inspectors of returning their certificate to the collector, was not such a return as this rule contemplates.

The rule contained in *Greenleaf* on this subject is stated to be, that, "In regard to certificates, given by persons in official station, the general rule is, that the law never allows a certificate of a mere matter of fact, not coupled with any matter of law, to be admitted as evidence." 1 *Greenl.* § 498. This statement of the law is exceedingly indefinite and unsatisfactory, but still it affords no support to the case presented by the defendants. In People *v.* Minck, 21 *N. Y.* 539, the inspec-

tor's return was held to be evidence, because the general principles embodied in the statute established that to be the character of their action. And besides that, it was plainly within the rule mentioned by the supreme court of New Hampshire. None of these cases sanction the principle contended for by the defendants.

The objection taken to the question put to the witness Beach, as to what would have been the indications if a person was suffocated, and afterwards falls or is thrown overboard, was somewhat singular and peculiar. It was, that there was no evidence to show that the deceased had been thrown overboard, and there is no pretense that she was. As the plaintiff's right to propound the question did not depend entirely upon that circumstance, there was no impropriety in allowing the question to be answered. The objection that the opinion of the witness was incompetent was not included in the ground taken at the trial.

[The learned judge, after disposing of several minor objections to evidence, which he overruled because not sufficiently explicit, concluded that the judgment should be affirmed.]

A majority of the judges concurred.

Judgment affirmed, with costs.

ERIE AND NEW YORK CITY RAILROAD COMPANY *v.* PATRICK.

September, 1865.

On a subscription paper by which the subscribers are bound severally and not jointly, two subscriptions made at the same time, and by the same person, but one in his individual name, and the other with the addition, *Ex'r.*, are separate contracts on which separate actions will lie.

Hence the pendency of an action for the amount due in respect to one of these subscriptions is not ground for abating a subsequent action on the other.

The Erie & New York City Railroad Company sued Richard Patrick to recover the balance due on a subscription for two

thousand five hundred dollars, for fifty shares of the capital stock of the Erie & New York City Railroad. There were numerous subscribers for the stock, all signing the articles of association, and each for himself, severally, agreeing to take the number of shares set opposite to his name, and to pay for the same by certain installments. The defendant subscribed his name and placed opposite to it fifty shares, two thousand five hundred dollars, and then immediately subscribed his name again, adding thereto the letters *Exr.*, saying he would also take fifty shares for an estate of which he was executor, and writing again opposite the last signature also fifty shares, two thousand five hundred dollars. This action was brought to recover the amount unpaid on this last sum. The referee, by whom the cause was tried, found that, prior to the commencement of this action, the plaintiff commenced an action in the supreme court, and by the complaint claimed to recover upon the contract set forth, one of the sums of two thousand five hundred dollars, less the amount paid thereon, and that issue was joined, and the same was pending and undetermined when this action was commenced; and, further, that, before the commencement of this action, the whole five thousand dollars had become due and payable; and he held and decided that, in judgment of law, the two subscriptions for two thousand five hundred dollars each constituted but one contract for the payment of five thousand dollars; and he ordered the complaint in this action to be dismissed with costs, but without prejudice to the plaintiff's right to bring a new action. The judgment being affirmed at general term, the plaintiff appealed to this court. Other questions arose in the progress of the trial, but the only one now presented was, whether these two subscriptions constituted one entire and indivisible contract.

The court below, at general term (where the judgment entered on the report of the referee dismissing the complaint, was affirmed), held that the addition of Exr. to the name of the defendant where it was secondly subscribed might be excluded from consideration, as it had no legal effect and did not bind the defendant in a representative capacity, nor any estate of which he was executor, and that the only claim against him was in his individual capacity; that the addition might be

evidence of the intention of the defendant, but that intention was not material unless carried into effect by some operative act; that the word "Exr." being excluded, the instrument signed by the defendant was an agreement to take and pay for the number of shares set opposite his name. To this agreement the name of the defendant was twice subscribed, with half of the shares set opposite it each time. There was but one instrument containing all the stipulations of the parties, and the contract of the defendant was one and indivisible. The pendency of the other action therefore constituted a defense to this. Citing Secor *v.* Sturgis, 16 *N. Y.* 548.

From the judgment plaintiff appealed to this court.

Hazeltine & Clark, for plaintiff, appellant.

C. Tucker, for defendant, respondent.

By the Court.—Campbell, J. [After stating facts]—It is well settled that where a plaintiff brings an action for a part only of an entire and indivisible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit for another part of the same demand. As was said in Secor *v.* Sturgis, 16 *N. Y.* 548, 554, "it results from this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits, and, if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits." But it is only entire claims, such as are indivisible in their nature, which cannot be divided—not such as are separate and independent of each other. But the whole subject is fully discussed and numerous authorities in this State cited and commented on in Secor *v.* Sturgis, and it was held in this court in that case, that, where the plaintiffs were carrying on different branches of business—some of the partners managing one branch, and other partners conducting the other branch, and all having a common interest in the whole business—that the prosecution and recovery of a claim, arising out of work and

labor performed by one branch, formed no defense to a claim arising from goods sold and delivered by the other branch, though both claims were due and payable when the first action was commenced.

That decision virtually overruled some of the authorities in this State, as will be seen by a reference to such authorities cited and commented on in the opinion delivered in that case, and to which it is only necessary to refer. That case decides that claims which under some of the former decisions in this State were held to be entire and indivisible, were separate and independent contracts, and might be prosecuted as such at the option of the plaintiffs.

Now, what is the fair construction of the two subscriptions which the defendant made? The agreement which he signed, undertaking to pay for certain shares of stock, was signed by numerous other parties, all signing not jointly but severally, and each subscriber as much bound, irrespective of any other subscriber, as if his name had been signed to another copy of the instrument of agreement. The agreement which the defendant signed was virtually a contract to purchase a certain number of shares of stock thereupon to be issued to him and to pay therefor a certain sum of money. Waiving any consideration of what was said at the time by the defendant of the object he had in view in making his two distinct subscriptions, and looking alone at his acts, what construction is to be put on them? The subscriptions were made at the same time, separately—one of the simple signature—to the other signature the letters *Exr.* were added, showing conclusively that the latter subscription was not an addition to the former, but entirely irrespective and independent of it. That the defendant became personally bound by the latter as well as by the former subscription makes no difference in this view, inasmuch as there was a manifest intent on the part of the defendant to make separate contracts for his purchase of the five thousand dollars of stock. Suppose the defendant had signed at the same time two instruments in the form of promissory notes, both containing subtantially the agreement he entered into; each of the same date and tenor, and reciting that, in consideration of, or for value received in, fifty shares of stock thereupon to be issued to

him, he promised to pay the sum of two thousand five hundred dollars. No doubt can arise but he could be prosecuted on each instrument in separate actions. The defendant did virtually the same thing. He subscribed his name a second time, not by mistake but purposely; not to add to his former subscription, but to make another and independent one; and, whether he signed one paper, or two papers, one the copy or transcript of the other, makes no difference. He declared his intent to make separate contracts, and manifested his intent by his acts. It seems to me very clear, therefore, that the plaintiff's claim is not entire and indivisible, but, on the contrary, it was understood at the time of the subscription that the defendant made two separate contracts, and, also, such is the fair construction to be put upon his acts. It was optional therefore with the plaintiff to commence one or two actions. Whether they should not have been consolidated was another question. But the defendant made no effort in that direction. I am of opinion that the pendency of the action to enforce payment of the first subscription forms no sufficient grounds for abating the action to enforce the second subscription.

The judgment should be reversed, and a new trial ordered.

All the judges concurred, except DAVIES, J., who read an opinion for affirmance.

Judgment reversed, and new trial ordered, costs to abide event.

FAKE *v.* SMITH.

June, 1869.

Plaintiff purchased a note from defendants, who were the payees therein, upon which he sued the makers, who set up the defense of usury. He served a copy of the summons, complaint, and answer in that action upon defendants in this action, with a request that they assume the prosecution of that action, which they neglected or refused to do. It was referred, and tried, the defendants being sworn as witnesses on behalf of plaintiff. The referee reported in favor of the makers, upon which report judgment was perfected. Plaintiff paid the costs recovered against him, also those of his own attorney, and served a copy of the report and judgment upon defendants, demanding the amount of

the note, the costs recovered against him by the makers thereof, and the amount of statutory costs paid his own attorney.—*Held*,

1. That there was an implied warranty by defendants, on the sale of the note, that there was no legal defense to an action upon it.

2. That, having had notice of the defense interposed, and an opportunity to prosecute the action to judgment, they were estopped from showing, on the trial of the action upon such warranty, that the note was not in fact usurious.

3. That a *plaintiff* may avail himself of the right to cast the burden of an action upon his vendor, in the same manner as a *defendant*.

4. That the judgment upon the report of the referee was admissible in evidence against these defendants, and was as conclusive upon them as if plaintiff had not consented to a reference of the action, but had tried the issues at the circuit before a jury.

5. That plaintiff was entitled to recover the several items claimed.*

Isaac W. Fake (for whom, on his death pending the action, Kate F. Fake, administratrix, was substituted), sued John C. Smith and Hiram R. Wood, on a warranty upon a sale of a note by defendants to plaintiff's intestate.

The note, for three hundred and thirty dollars, was made by Baldwin & Fake, March 24, 1858, payable to defendants, or order, one year after date. Plaintiff's intestate purchased it of defendants May 18, 1859, paying them the face, with interest. He commenced an action thereon against the makers, February 8, 1862, when they set up as a defense that it was given under an agreement made in this State in March or April, 1857, with defendants in this action, that defendants should loan them two thousand dollars, for which they should give a good indorsed note, payable ninety days after date, but to run a year. That the makers should transport the money to Iowa, their place of business, and there loan it at forty per cent. per annum, and that after deducting the seven per cent. legal interest on the two thousand dollar note, pay defendants one-half the balance between that and the forty per cent. The arrangement was consummated, and the makers paid the two thousand dollar note and interest. About a year thereafter, although the makers had collected neither principal nor interest, they gave the note

* Compare Wells *v.* Mann, 45 *N. Y.* 327; Andrews *v.* Gillespie, 47 *Id.* 487. Calling the guarantor as a witness, is not, alone, enough. Barmon *v.* Lithauer vol. 1, p. 99, of this series.

in controversy for sixteen and one-half per cent. on the two thousand dollars.

After issue joined in the action against Baldwin & Fake, plaintiff's intestate served upon Smith and Wood, defendants in the present action, a copy of the summons, complaint and answer in the action against Baldwin & Fake, with notice of the action, and requested them to assume the prosecution thereof. They declined so to do. The cause was tried, both of the defendants in the present action being sworn as witnesses on the part of the plaintiff in that action. The referee found the facts as claimed by the makers; that the note was usurious by the laws of this State, and also those of Iowa; and judgment was perfected in favor of the makers against the plaintiff's intestate for ninety-three dollars and thirty cents costs, which he paid. He also paid his attorney in that action sixty-eight dollars and thirty-five cents costs, which he would have recovered had he succeeded therein. Prior to the commencement of this action plaintiff's intestate served upon the defendants a copy of the referee's report and judgment, tendered the note, and demanded of them separately the amount paid for the note, with interest, the costs recovered against him by the makers, and the amount of costs he would have recovered had he succeeded therein, which was refused.

The court directed a verdict for plaintiff for the amount claimed. Defendants' exceptions were ordered to be heard in the first instance at general term.

The supreme court, in an opinion by MASON, J., applied the rule that where the vendee of a chattel is sued by a third person claiming title to the property, and the vendor has notice of the action and an opportunity to defend, that the judgment against the vendee is conclusive in an action by the latter against his vendor on the implied warranty of title, although the vendor was no party to the action. Craig *v.* Ward,* 36 *Barb.* 377, 383; Burt *v.* Dewey, 31 *Id.* 540. S. P., Cooper *v.* Watson, 10 *Wend.* 203, 205; Kelly *v.* Dutch Church, 2 *Hill*, 105; 3 *Watts*, 311; 3 *Watts & Serg.* 409; 4 *Mass.* 349; 2 *Smith L. Cas.* 553, American note. If the party against whom

* Affirmed in this court, see report in vol. 1, p. 454, of this series.

the former judgment is sought to be used, was or had an opportunity to be heard, the matter litigated is the same, and the parties are in privity as to such matters, that is enough. 14 *N. Y.* (4 *Kern.*) 329; 4 *Id.* (4 *Comst.*) 71; 3 *Barb. Ch.* 341; 3 *N. Y.* (3 *Comst.*) 511; 7 *Barb.* 494; 36 *Id.* 383. And the court relied on Delaware Bank *v.* Jarvis, 20 *N. Y.* 226; White *v.* Madison, 26 *Id.* 117, in support of the recovery as to costs; and held that it was no objection that the judgment in the suit against Baldwin & Fake was given by a referee, on a reference of the cause, for all issues are now referable upon the written consent of the parties. *Code*, § 270.

From judgment perfected on the verdict, defendants appealed.

Dewitt C. Bates, for the defendants, appellants;—Insisted that the cases of Bank of Delaware *v.* Jarvis, and Craig *v.* Ward, were distinguishable from this case.

N. C. Moak, for defendant, respondent;—Cited, Blasdale *v.* Babcock, 1 *Johns.* 517; Cooper *v.* Watson, 10 *Wend.* 203; 2 *Greenl. Ev.* § 116; Castle *v.* Noyes, 14 *N. Y.* (4 *Kern.*) 332, 335; Miner *v.* Clark, 15 *Wend.* 425; Delaware Bank *v.* Jarvis, 20 *N. Y.* 227; Fay *v.* Ames, 44 *Barb.* 327; Beers *v.* Pinney, 12 *Wend.* 309, 310; White *v.* Madison, 26 *N. Y.* 129; Thomas *v.* Hubbell, 18 *Barb.* 9; Kettle *v.* Lipe, 6 *Id.* 467; Wright *v.* Whiting, 40 *Id.* 235; Howe *v.* Buffalo R. R. Co., 38 *Id.* 124; 37 *N. Y.* 297, 299; Burt *v.* Dewey, 31 *Barb.* 540; Craig *v.* Ward, 36 *Id.* 383, and cases cited; Castle *v.* Noyes, 14 *N. Y.* (4 *Kern.*) 332, 335; 12 *Vt.* 381; *Sedgw. on Dam.* 295, marg. p.; Shorter *v.* People, 2 *N. Y.* (2 *Comst.*) 193; Neff *v.* Clute, 12 *Barb.* 466; Rider *v.* Pond, 19 *N. Y.* 262; Walrod *v.* Ball, 9 *Barb.* 271; Furniss *v.* Ferguson, 15 *Id.* 437; 34 *Id.* 485, 488; Carman *v.* Trude, 25 *How. Pr.* 440; 1 *Hill*, 287; *Edw. on Prom. N.* 191; *Story on Prom. N.* § 118; *Story on Sales*, 3 ed. § 367 *i*; 2 *Ell. & Bl.* 849; 1 *Pars. on Cont.* 5 ed. 584, note *s*; 27 *Barb.* 652; King *v.* Fitch, reported in this series; Matter of Empire City Bank, 18 *N. Y.* 217; People *v.* Board of Supervisors, 12 *How. Pr.* 54; Murray *v.* Murray, 5 *Johns. Ch.* 60; Jackson *v.* Marsh, 5 *Wend.* 46; Robbins *v.* City of Chicago, 4 *Wall.* 672–675;

Kellogg *v.* Forsyth, 24 *How. U. S.* 186; Howe *v.* Buffalo R. R. Co., 38 *Barb.* 124; 37 *N. Y.* 297; Barney *v.* Dewey, 13 *Johns.* 224; Brewster *v.* Countryman, 12 *Wend.* 450; Chicago City *v.* Robbins, 2 *Black*, 423; 4 *Wall.* 672–675; Walker *v.* Ferrin, 4 *Vt.* 523; Carpenter *v.* Pier, 30 *Id.* 81; Howe *v.* Buffalo R. R. Co., 38 *Barb.* 124; Rickert *v.* Snyder, 9 *Wend.* 416, 423; Delaware Bank *v.* Jarvis, 20 *N. Y.* 226, 228, 230; White *v.* Madison, 26 *Id.* 117, 129; Baxter *v.* Ryerss, 13 *Barb.* 267; 3 *Pars. on Cont.* 5 ed. 165, and note; *Id.* 212; *Sedgw. on Dam.* 165, marg. p.

By the Court—Lott, J.—The defendants' answer shows that they were privy to the consideration of the note set forth in the complaint, and the facts and circumstances under which it was given, and transferred to Isaac W. Fake, the plaintiff's intestate (by whom this action was commenced, and who is referred to when the plaintiff is herein spoken of), and that after the defense of usury was interposed in an action commenced by him against the makers thereof, he notified each of them by a notice in writing of the commencement of that action, and of such defense, and therewith served each of them with a copy of the summons, complaint and answer therein, and in the notice he also requested and required them to assume the prosecution of the said action, and to prosecute the same to judgment, and that they, or either of them, would be allowed to do so, but that they, and each of them, refused to comply with such request and requirement, or to have anything to do with the prosecution of the action; that they were severally subpœnaed and sworn on the trial of the action, on behalf of the plaintiff, and that they were subsequently served with a copy of the judgment rendered against the plaintiff therein, and with a copy of the report of the referee on which said judgment was entered, and he demanded of them the amount of said note with interest, and the amount of said judgment, and his own costs and disbursements, with a reasonable counsel fee, specifying the several amounts claimed. He afterward, and before the commencement of this action, tendered to the defendants the note in question, and also at the same time demanded the return of the consideration paid therefor, and payment of such

judgment, costs, and counsel fees, but they refused to accept said note, or comply with such demand, or any part thereof.

It is further shown by the bill of exceptions that the judgment roll in said action was introduced and read in evidence, from which it appeared that the judgment was recovered on the note set forth in the complaint in this action; that the defence of usury was interposed, that the issues were duly referred to a referee to hear and decide the same, and that he, after the trial thereof, found in express terms that the said note was usurious and void, as alleged in the answer of the defendants.

It also appeared that before the commencement of this action the plaintiff had paid and satisfied the said judgment so recovered against him, together with the account of the statutory costs that would have been recoverable by him if he had succeeded in that action.

Upon these facts, the defendants moved the court to nonsuit the plaintiff on the ground that he had not shown a cause of action which entitled him to recover. That motion was denied, and then (no proof having been introduced by defendants) the court ruled and decided that the plaintiff was entitled to recover the amount he paid for the note, and interest thereon from the date of the purchase thereof, together with the amount of costs included in the said judgment, and the statutory costs to which he would have been entitled if he had obtained judgment for the note with interest on said sums respectively from the time of payment thereof. A verdict was accordingly rendered for said amount, and judgment entered thereon.

Exceptions were duly taken by the counsel of the defendants to the denial of said motion, and also to such ruling and decision; and the principal question for decision on appeal to this court is presented by these exceptions.

Upon the preceding facts the plaintiff was within the decision of this court in the case of Delaware Bank *v.* Jarvis, 20 *N. Y.* 226, clearly entitled to recover the whole amount for which such judgment was rendered.

The material facts in that case and in this are substantially the same, and the judgment on the merits is conclusive on us.

An exception was taken to the introduction, by the plaintiff, of the judgment roll above mentioned, and to proof of payment

of the costs included therein, and of the statutory costs of his attorney, by the plaintiff.

The defendants, under the decision referred to, impliedly warranted, on the transfer of the note by them, against any legal defense to an action thereon; and having had notice of the defense interposed, and an opportunity to enforce its collection, they were, within the rule referred to by the learned justice delivering the opinion of the supreme court, and the authorities cited by him in support thereof, bound by the judgment.

I can see no ground for the defendants' objection to evidence showing the payment by the plaintiff of the judgment and costs. They constitute the damages which he was entitled to recover; and it certainly was competent, if not necessary, to prove them.

An exception was also taken, on behalf of the defendants, to the exclusion of an offer on their behalf to prove, by one of them, the true consideration of the note in question, and that the same was not usurious.

This evidence was properly excluded. They had had full opportunity to show, in the action brought against the makers, any and everything which would have entitled the plaintiff therein to a recovery. They neglected to avail themselves of it, and the judgment therein, as before stated, is conclusive on them.

It may be proper to add that the defendants' counsel, in his points, claims that proof given, on the part of the plaintiff, of the amount of his taxable costs in the action against the makers was improper, first, because they had not been taxed by a proper officer, and second, because the items should have been proven or shown to the court, and by the court passed upon as matter of law, and that it was erroneous to allow the witness to swear to a conclusion of law.

It is a sufficient answer to this position to say that neither of these grounds was stated on the trial. On the plaintiff's offering "to prove (by one of his attorneys) the amount of the plaintiff's taxable costs in that action, and the payment of the same to him by the plaintiff," the counsel for the defendants "objected to such evidence, as being illegal, incompetent, and im-

material." This objection was to the *matter* offered in proof, and not to the mode of proving it. If the latter ground had been stated, it might have been obviated by additional evidence. It is now too late to raise that objection on appeal in this court.

It is also now claimed by the defendants' counsel that the judgment in the action on the note is not binding on them, because, it being not referable by law, was tried by a referee on an order of reference to him by consent. Such reference was allowable under section 270 of the Code of Procedure; and the counsel admits that "the parties to the action are no doubt bound by it." This concession is properly made, and is fatal to his objection. The defendants, as well as the parties, for the reasons above referred to, are bound by the judgment.

These views lead us to the conclusion that the judgment should be affirmed, with costs.

Judgment affirmed, with costs.

FALLON *v.* PEOPLE.

September, 1865.

Affirming 6 *Park Cr.* 256.

Under 2 *R. S.* 649, § 63, and *L.* 1862, c. 374, § 2, an indictment for grand larceny in stealing money from the person need not aver that it was stolen in the night time; and a conviction may be sustained if property of any value is taken.

Indictment for stealing from the person: verdict, guilty, as charged, of grand larceny, in stealing from the person,—*Held*, no variance.

Whether, on an indictment for stealing bank bills, the fact that the bill had been paid and received as money is evidence of the existence of the bank and the value of the bills,—*Query?*

John Fallon was convicted at the Erie oyer and terminer of grand larceny. There were three counts in the indictment. 1. Charging that he stole from the person of one Main four five dollar and one ten dollar bank bill. 2. That he stole bills designated in the same manner from a person unknown. 3. That he received from a person unknown the like bills, the property of said Main, knowing them to be stolen. The jury found the

prisoner guilty of grand larceny in stealing from the person, as charged in the first count, and not guilty as charged in the other counts.

On the trial evidence was given by the people showing that two of the five dollar bills were bills of banks of this State. The two other fives were of banks to the jurors unknown, and the ten dollar bill was a bill of a bank in the State of Rhode Island, and also showing that all said bills had been received in payment by Main for labor and services, and that the same were stolen from his person by the prisoner in the night time. No evidence was given showing that there was no such bank in Rhode Island as the one named in the ten dollar bill, nor was evidence given of the genuineness or value of any of the bills, other than that they were received by Main from his employer in payment for his labor.

No objection was taken to the admission of evidence, nor was any question raised as to the value and genuineness of the bank bills of this State. The prisoner's counsel requested the judge to charge that the fact that the ten dollar bill was paid to Main for his labor was no evidence that it was genuine, and of the value of ten dollars, and, also, that the prisoner could not be convicted of stealing said ten dollar bill, for the reason that it purported to be a bill of a bank in the State of Rhode Island, and there was no evidence before the jury that there was any such bank, or that the bill was a genuine one. Both requests were refused, and there were exceptions taken. He was sentenced for two years and one month. A motion was made in arrest of judgment, which was denied.

The supreme court affirmed the conviction (reported in 6 *Park Cr.* 256), and the prisoner brought the conviction before this court by writ of error.

S. Lockwood, for plaintiff in error.

C. C. Torrance, District Attorney, for the people.

WRIGHT, J.—The record states that the plaintiff in error moved in arrest of judgment, but upon what ground does not appear. The point now taken in his behalf is, that there is a fatal variance between the verdict of the jury and the indict-

ment. The verdict was "guilty as charged in the first count of the indictment, of grand larceny in stealing from the person," and the claim is that the count is not good except for simple larceny—that as a charge of stealing from the person of another, it is insufficient in not alleging that the larceny was in the night-time. There is no substance in the point. Grand larceny is defined in the Revised Statutes to be "the felonious taking and carrying away the personal property of another of the value of more than twenty-five dollars," and the punishment prescribed is imprisonment for a term not exceeding five years. 2 *R. S.* 679, § 65. A succeeding section provides that "if such larceny be committed by stealing in the night-time from the person of another, the offender may be punished by imprisonment in a State prison not exceeding ten years." § 65. This is simply a provision for increasing the punishment where the offense of grand larceny has been committed under the aggravating circumstances specified. In 1862 a statute was passed, one of the sections of which is as follows:

"Whenever *any* larceny shall be committed by stealing, taking and carrying away *from the person* of another, the offender may be punished as for grand larceny, although the value of the property taken shall be less than twenty-five dollars." *L.* 1862, ch. 374, § 2. The statutes thus made it grand larceny to steal from the person, though less than twenty-five dollars in value be stolen; and this, without regard to the circumstance whether the larceny be committed in the day or night-time. The indictment, in this case, charged the stealing of bank-notes of the value of thirty dollars, from the person of Main, and was not defective in omitting to aver that the property was stolen in the night-time. The count was good under the statutes of 1862, and there was no fatal variance between it and the verdict of the jury.

The witness Main testified that the money stolen consisted of four five dollar bills on banks of the State and one ten dollar bill of the American Bank of Rhode Island, and that the same had been received on the day of the larceny from W. Hinsler, of Tonawanda, in payment for work he had done for him. The prisoner requested the court to charge that the fact

that the ten dollar bill was paid to Main for his services, by Hinsler, and was received by Main in payment, is no evidence that it is a genuine bank bill and that it was of the value of ten dollars, and that the jury cannot convict for the stealing of the ten dollar bill, for the reason that the instrument in proof purports to be a bill of a bank of the State of Rhode Island, and that there is *no* evidence that there is any such bank, or that the note in evidence is a genuine note. The instruction was refused, and, I think, properly. On a prosecution for stealing bank bills of another State, when the point is raised, it is incumbent on the public prosecutor to give some proof of the existence of the bank, and that the bills are genuine. He is not required, however, to produce the charter of incorporation of the bank, or show by experts the genuineness of the notes, purporting to have been issued by a particular bank; that such notes have been received and passed away in part of the currency of the country, is *prima facie* sufficient to prove the existence of the banks as well as the genuineness of the note. Here the request was to charge that the fact that the ten dollar bill on the American Bank of Rhode Island was paid to Main for services, and received by him in payment, was *no evidence* that it was a genuine bank-bill and of the value of ten dollars. In my judgment, such an instruction would have been error. The fact that it was paid out and received at ten dollars, was some evidence of its value, and that it had been paid and received in the ordinary course of business as part of the currency of the country was competent proof, however slight it may have been, on the question of its being a genuine bank bill. As it was competent evidence touching the question, it would have been erroneous to have withdrawn it from the consideration of the jury.

But it was immaterial whether the ten dollar bill was genuine and valuable or not. Other bills, on banks of the State, amounting to twenty dollars, about which no question was made, were stolen. The crime was committed if property of any value was taken from the person.

The judgment should be affirmed.

CAMPBELL, J. [After stating the facts.]—The object of the

prisoner's counsel on the trial doubtless was to reduce the offense from grand to petit larceny. For that purpose, it was a material question whether there was sufficient evidence before the jury as to the existence of the Rhode Island bank and the genuineness of the ten dollar bill. I am of opinion there was not, and that the prisoner was entitled to the instruction (People *v.* Caryl, 12 *Wend.* 547; Johnson *v.* People, 4 *Den.* 364), unless we can see that the result of the conviction would not have been changed had instructions been given and followed by the jury. The punishment for grand larceny is imprisonment in the State prison for a term not exceeding five years; but, if such grand larceny is committed by stealing the personal property of another of the value of twenty-five dollars from his person in the night time, then the offense may be imprisonment for a term not exceeding ten years. 3 *R. S.* 5 ed. p. 958, §§ 65, 267. But the indictment charged the stealing from the person, but not in the night-time. There could be no conviction, therefore, which would raise the punishment beyond the five years—the limit where the offense is simple grand larceny.

But the act of 1862 (ch. 374, § 2) declares that, where a larceny is committed by stealing from the person, the offender may be punished as for grand larceny, although the value of the property stolen shall be less than twenty-five dollars. In the case before us there was evidence given and not objected to, showing that some of the bank bills stolen were bills of banks of this State, and whose value and genuineness were not disputed or questioned. That some portion of the property stolen had value cannot be disputed, and was not questioned. As all the bills were received by Main in payment for his labor, and having no proof to the contrary, it may be claimed that each and all had value. The amount, inasmuch as the property was stolen from the person, is not material. It was not charged in the indictment that this stealing from the person was in the night-time, and the punishment might be the same, whether the amount stolen was ten dollars or twenty dollars. In either case, the term of imprisonment could not exceed five years, and in either case it would be in the discretion of the court to sentence for that period of time or for a shorter time.

We can thus see plainly that the prisoner could not be injured by the refusal to charge by the judge, as requested. I am of opinion the conviction and judgment should be affirmed.

All the judges concurred, except BROWN, J., who was absent.

Judgment affirmed.

FARMERS' BANK OF WASHINGTON COUNTY *v.* COWAN.

December, 1865.

An agreement between a mortgagor and mortgagee of chattels composing the stock of a foundry, that the mortgagor might remain in possession after default, and carry on the works as the agent of the mortgagee, and that the latter would apply the proceeds of sales of the manufactured articles to the payment of the mortgage debt, is not as matter of law fraudulent; and manufactured articles belong to the mortgagee and are not subject to levy and sale on execution against the mortgagee, unless fraud in fact is established.*

On the argument of an appeal, the court may allow a defect in record evidence to be supplied.

An objection to an improper answer, given to a proper question, must be taken by motion to strike out.

The Farmers' Bank of Washington County sued Hugh R. Cowan, for the conversion of personal property. The defense was that the property in question belonged to one Benjamin F. Woodruff, and that the defendant, as sheriff of Washington county, had seized and sold it on executions issued against him.

On the trial, it appeared that on December 1, 1856, Woodruff, the owner of the Mount Hope Iron Works, being indebted to Mallory & Co. of Troy (Mallory, Ingalls and Tibbetts), made a settlement with them, and gave them seven promissory notes of that date—one for upwards of seven thousand dollars, payable one day after date, and the others payable in a few months after date.

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* See also Conkling *v.* Shelley, 28 *N. Y.* 360; Frost *v.* Warren, 42 *Id.* 204.

To secure the payment of these notes, Woodruff gave a chattel mortgage of all his personal property pertaining to the Mount Hope Iron Works, in which it was stipulated that in case of a default in payment of any part of the money, the mortgagees might enter on the premises where the property was, and carry away and sell the same, but until such entry and demand, Woodruff was to remain in possession of the property, but that his possession was to be deemed the possession of an agent or servant for the sole benefit of his principals, the mortgagees. This mortgage was dated on the first and filed on December 11.

On the same day that the notes and mortgage above mentioned were given, the parties entered into an agreement in which was recited the settlement, the indebtness, the making of the notes and the giving of the mortgage as a security,—and by it the parties agreed, that after that date, all outlays on account of the business of the iron works should be made in the name and for the benefit of Mallory & Co., and that all iron manufactured should be their property, and Woodruff agreed to work and manage the business until his indebtedness should be fully paid. Prior to this, and on May 27, 1856, a decree of foreclosure of a mortgage of real estate was entered in the supreme court, by which the real estate comprising the iron works, excepting one ore bed, was directed to be sold, and accordingly was sold and purchased by Mallory & Co. on September 30, 1856.

On December 19, 1857, Woodruff made to the plaintiffs two notes, to secure the payment of which Mallory & Co. made to the plaintiffs a bill of sale of eighty-five tons of iron then at the iron works, and agreed to deliver it at Fort Ann village, within three months thereafter. In accordance with this agreement, the iron was taken to the dock at Fort Ann, and the plaintiffs notified thereof, and afterward signified their acceptance of it.

On December 19, 1857, the same day that the bill of sale was made, the defendant, as sheriff, levied on the iron under an execution against Woodruff, at the suit of third persons, and subsequently, after the iron had been removed to Fort Ann, sold it.

Plaintiffs brought this action for the conversion of the property, and recovered judgment.

The supreme court at general term affirmed the judgment, upon the same grounds, as to the merits, as are stated in the opinion of this court.

The main points determined by the supreme court, besides the question on the merits, were,

1. That on the argument of an appeal, at general term, a defect in record evidence may be supplied.

On the trial, the court received in evidence the deed given on the mortgage foreclosure, without requiring the mortgage, the judgment of foreclosure, or other proceedings to authorize the giving of the deed to be shown and three of the four judges in the supreme court agreed that this defect could be supplied on the argument. See Markoe *v.* Aldrich, 1 *Abb. Pr.* 55. The other judge, without expressing any opinion on this point, thought the evidence was not necessary.

2. That where a question put to a witness is proper, and the answer improper,—*e. g.*, because hearsay,—a motion to strike out the answer is essential, before the case is submitted. If such motion be not made, an exception does not lie to the charge of the judge that the jury may consider such answer as part of the evidence. Compare Reddington *v.* Gilman, 1 *Bosw.* 235.

James Gibson, for defendant, appellant;—As to the validity of the mortgage and contract, cited Randall *v.* Parker, 3 *Sandf.* 73; Griswold *v.* Sheldon, 4 *N. Y.* (4 *Comst.*) 588; Darwin *v.* Handley, 3 *Yerg.* 504; Waterbury *v.* Sturtevant, 18 *Wend.* 361; Dunham *v.* Waterman, 17 *N. Y.* 9; Edgell *v.* Hart, 9 *N. Y.* (5 *Seld.*) 217; and 6 *Hill*, 438; 1 *E. D. Smith*, 445; 4 *N. Y.* (4 *Comst.*) 214, 581.

John H. Reynolds, for plaintiff, respondent.

CAMPBELL, J.—The answer of the defendant is, in brief, that the property mentioned in the complaint was not the property of the plaintiff, nor was the same in plaintiff's possession, but,

on the contrary, the property was owned and possessed by one Benjamin F. Woodruff; that the defendant was sheriff, and sundry executions came into his hands against the said Woodruff and others, and that, by one of his deputies, he caused the said property to be levied on and sold as the property of Woodruff. The two issues raised by the answer were: first, was Woodruff owner of the property levied on and sold? and, if not, second, did the property belong to the plaintiff, or was it in the possession of and under plaintiff's control? To these points the evidence on the trial was directed; and on both issues the jury found against the defendant.

The chattel mortgage given by Woodruff to Mallory, Ingalls and Tibbetts was, I think, in the usual and customary form. It was a sale of the property with a condition that it should be void on the payment of a specified amount of money as shown by certain promissory notes. In case of a default in payment of any part of the money, the mortgagees were empowered to enter on the premises where the property was, and to carry away and sell the same; but until such entry and demand made, Woodruff was to remain in possession of the property, and in the full and free enjoyment of the same, but with the further condition that, until such demand made, such possession was to be that of an agent for the sole benefit of his principals, the mortgagees. On looking at the notes which this mortgage was given to secure, it is seen that the largest note, being one for over seven thousand dollars, was made payable after one day, so that the default probably occurred almost immediately on execution, whereby the title at once vested in the mortgagees.

But though the title vested, there was not an absolute forfeiture. There was a right in equity, still remaining in Woodruff, to redeem. This, after default, was all the interest he had in the property, and was all in fact he could transfer even to a *bona fide* purchaser for full value,—though having the property in possession, he might transfer such possession, together with his right of redemption. But the mortgagees could at any time take the property out of the possession of such *bona fide* purchasers and sell the same. In case of sale, if there was a surplus after paying the mortgage debts, that would belong to the

mortgagor or his vendee or assigns. But after default, until such redemption or sale, the title is in the mortgagees. The interest of the mortgagor is identical, whether in case of redemption or sale; it is only what remains after the mortgage debt is paid, and that is all which the sheriff could levy on and sell.

But in this case, as may fairly be inferred, the furnace was running constantly, and, the mortgage having been given more than a year before the levy, it is not probable that any of the iron mortgaged remained on the premises and formed a part of that now in controversy. If any such iron remained, the sheriff could not sell it absolutely under executions against Woodruff. He could only sell Woodruff's interest, and the surplus remaining after payment of the mortgagee.

But, simultaneously with the execution of the chattel mortgage, a separate agreement was entered into between the mortgagor and mortgagee, by which it was further stipulated that the mortgagor might remain in possession and carry on the furnace as the agent of the mortgagees; the mortgagees were to furnish all the funds, and all the iron made was to belong to the mortgagees. Under this arrangement, the furnace had been carried on for more than a year before the arrangement made between the mortgagees and the plaintiff in this suit for the delivery of the iron in controversy. Certainly, as between the parties, such an arrangement as made between Mallory & Co. and Woodruff would be legal, and under it the title to the manufactured iron would be in Mallory & Co., and not in Woodruff. Though the proceeds of the sales, when received by Mallory & Co., were to be applied on the indebtedness of Woodruff to them, that would not affect the question of title to the property. Woodruff could sell the property as agent for Mallory & Co., but as between him and that firm, he was clearly not the owner. As against them, he could have no better title or claim to the manufactured iron than a stranger to the original transaction could have had, in the same position as agent;—that is, so long as the expenses of running the furnace and the original indebtedness to Mallory & Co. remained unpaid. The creditors of Woodruff could only assail the arrangements between him and Mallory & Co., on the ground that they were fraudulent in fact

as against them. This, the jury, on a full and fair submission of all the facts to them, have negatived. They found in effect that the iron in question belonged to Mallory & Co., and not to Woodruff.

If the iron was the property of Mallory & Co., then there can be, I apprehend, no doubt or difficulty as to the other branch of the case.

By the agreement between the plaintiff and Mallory & Co., the iron was to be delivered on the dock. It was so delivered. As Woodruff had no title to the property, the previous levy under execution against him in no way affected Mallory & Co.'s rights. The plaintiff was notified, and accepted the iron. The weight and bulk of the iron was such that there could be no manual delivery. It was not necessary to go on the dock and make a formal proclamation. As against a trespasser,—for such the sheriff was, if Woodruff had no title,—it is very clear that the possession of the plaintiff was sufficient.

There were numerous exceptions on the trial, but they are all so fully and correctly considered in the court below, that I do not think it necessary to go over them.

I think this judgment should be affirmed.

All the judges concurred, except PORTER, J., and DENIO, Ch. J., who were for reversal.

Judgment affirmed.

FARNHAM *v.* HOTCHKISS.

December, 1865.

The question whether a party had title to certain property, is, as an entire question, a question of fact, although its solution may depend on questions of law.* If an appellant would have the question reviewed in this court he must have the case so settled that the findings shall state the facts which raise the questions of law involved, and the conclusions of the court or referee thereon.†

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* Compare Fielden *v.* Lahens, p. 111 of this vol.

† See as to mode of so doing, Leffler *v.* Field, 47 *N. Y.* 407; and further decision in 42 *How. Pr.* 420.

Farnham *v.* Hotchkiss.

A breach of the covenant of seizin, like a breach of a covenant of warranty, is not, without eviction or disturbance, a defense to an action to foreclose a purchase money mortgage.*

Horatio N. Farnham brought this action in the supreme court against Wheeler Hotchkiss and Sterry Y. Peterson, to foreclose a mortgage executed by the defendant Hotchkiss, to one Thomas J. L. Tyler, dated April 21, 1855, to secure the payment of two thousand one hundred dollars, and interest, the purchase money for certain lands and mill and water privileges in the town of Hanover, county of Chautauqua, on Cattaraugus creek, and certain personal property. The mortgaged premises were conveyed by Tyler to Hotchkiss by deed, with covenants of warranty and seizin, dated the same day as the mortgage. The sum of five hundred dollars was indorsed upon the bond which accompanied the mortgage, as of the day it bore date, being a deduction from the purchase money in consideration of the loss of a part of the personal property, consisting of logs, &c., and an injury which occurred to the dam intermediate the time of the agreement to purchase and the time of executing the deed. The mortgage had been assigned by Tyler to Farnham, the plaintiff.

The defense relied upon was a failure of title and a breach of the covenants of the deed in respect to the race way through which the water was conducted to the mill.

The proof showed that the defendant had entered upon the possession and enjoyment of the mortgaged premises, and was so in possession during the pendency of the action. The referee to whom the trial of the action was referred, made a report in favor of the plaintiff, which set forth the facts concisely, but not the documents put in evidence. It also stated the referee's conclusions of law. The case and exceptions contained the testimony and documentary evidence at length. Upon the report judgment was entered.

The supreme court, in an opinion by GROVER J., held, that, as there had been no eviction or disturbance of the possession

* Compare York *v.* Allen, 36 *N. Y.* 104; and White *v.* Lester, reported in this series.

of defendant, and no fraud on the sale was shown, the failure of title was no defense to a foreclosure, and the liability for deficiency did not alter the case. Citing Edwards *v.* Bodine, 26 *Wend.* 109, and cases there cited.

The defendant appealed to this court.

John H. Reynolds, for defendant, appellant.

Chauncey Tucker, for plaintiff, respondent.

DENIO, Ch. J.—The decree of foreclosure sought to be obtained by the plaintiff in this action, was resisted on the allegation that the title of the mortgaged premises for the purchase price of which, upon a sale from the plaintiff's assignor to the defendant, the bond and mortgage were given, had failed. The parties gave in evidence numerous conveyances and other documents, and produced some oral testimony; and the referee before whom the action was tried has found the issues in favor of the plaintiff. His conclusions of fact affirm that Tyler, the vendor, at the time of the conveyance owned the lands and interests in water, described in the conveyance, in fee simple, and had lawful right to sell and convey them; and that the defendant Hotchkiss acquired such title as the deed professed to convey. A judgment of foreclosure was accordingly rendered.

The defendant's counsel now asks us to examine the evidence of title, which being chiefly documentary, was not subject to question, and to pronounce that the conclusion arrived at by the referee was erroneous. In my opinion we are not at liberty to review a judgment of the supreme court in that way. Whether a party had at a given time a title to property is, as an entire proposition, a question of fact determinable by a jury or other forum appointed to determine questions of fact. Its solution may depend upon mixed questions of law and fact, or wholly upon questions of law, or of fact. It is very probable that in this case the title may depend upon the construction or the effect of one or more of the conveyances, or the covenants, given in evidence, and upon the slight and uncontradicted parol evidence produced to connect these documents with the subject

to which they relate. If the defendant was desirous of having our judgment upon this evidence, it was his duty to have the case so settled that the findings should have stated the facts established by the evidence, or such parts of it as raised the questions of law, and then have stated his conclusions of law upon the evidence. We are often asked, on the hearing of appeals here, where the findings of a judge or a referee present no questions which admit of an argument, to go into the evidence and determine that the conclusions of fact are erroneous, on the allegation that the evidence is all one way, and that on the undisputed testimony the conclusions should have been different. But we have thought, and have uniformly decided, that we are bound to take the facts as they are stated in the case to have been found by the judge or the referee, and compare the judgment rendered with those statements of fact. In dealing with this case in that way, we see that the judgment is in strict legal conformity with the facts as found by the referee, and that no other judgment could be given than the one which has been given.

I am aware that this method of disposing of this appeal causes the case to depend upon a matter of form. By the manner in which the papers are prepared, the real question between the parties, if there is such a question, is lost sight of. But this is the fault of the legal advisers of the defendant. The various and diversified subjects which are brought before the courts, cannot possibly be understood and mastered, unless they are set forth and stated in some formal manner. The law and the decisions of this court have determined the manner in which questions of law are to be presented to our consideration. If parties will insist on printing a mass of evidence, and upon that ask us to reverse a determination made by a tribunal to which is conclusively intrusted the determination of questions of fact, they will of course be disappointed.

But the defendant's counsel, moreover, claims a reversal of the judgment appealed from upon the rulings of the referee against him on two occasions in the course of the trial. By an instrument given in evidence by the defendant, dated November 28, 1845, to which one Coleman (under whom the vendor

of the premises sold to the defendant, claimed title), was a party, there were provisions for changing a part of the course of the water race by which the water was to be conducted to operate the mill on the land sold. A part of the water, a right to which was one of the subjects of the sale, belonged originally to the riparian proprietors on the north side of the Cattaraugus creek, and it was one of the provisions of the instrument mentioned, that if the title to the north bank of the creek should fail and thereby prevent drawing the water through the contemplated new race, then the arrangements for changing the course of the race were not to take place, but the parties were to retain their antecedent rights. The plaintiff, it seems, sought to establish that the event thus provided for had happened; and for that purpose he offered in evidence a judgment roll in an action between the Seneca nation of Indians, plaintiffs, against one H. L. Knight, defendant, which record is annexed to the case. It appears by it that the plaintiffs recovered certain premises on the north bank of the Cattaraugus creek, opposite the point in controversy, and thus apparently established a title in the Indians as riparian proprietors and owners of water rights on that bank. It appeared that Knight was in possession under Sackett, through whom Coleman and the plaintiff claimed title, and who defended the action brought by the Indians. The record was received against the defendant's objection. I do not perceive why the evidence did not tend to establish, in some degree, the fact alluded to in the covenant; something more would probably be necessary to give it conclusive effect. A judgment in ejectment, acquiesced in for a certain length of time, confers title. 2 *R. S.* 309, § 38.

Another exception was taken to a ruling by which evidence offered by the defendant was rejected. Sackett, the source of title, as just mentioned, testified, on the defendant's examination, that he had had litigation respecting the race with two persons, whom he named. The defendant then offered in evidence a judgment record in favor of Sackett against one Shumway, who was not one of these persons, and stated that he offered it to show that Sackett's title to the north bank of the creek, at the point in controversy, had not failed. It was objected to as immaterial by the plaintiff's counsel, and rejected,

and the defendant took an exception. It does not appear what the contents of the record were. What the defendant expected to establish by it, is indeed stated; but, without a statement in the document of some subject of the action, and such a subject as related to the controversy on trial, it cannot be said that it was material or pertinent evidence. I do not think that error can be predicated of this ruling.

The defense in this action appears to have turned very much, if not wholly, upon the effect of the contract before mentioned, between Sackett of one part, and Coleman and others of the other part, of November 28, 1845. If the course of the race had been changed, as contemplated by the provisions of that contract, the water right embraced in the conveyance to the defendant would have been subverted, and the consideration for which the bond and mortgage were given would have failed. As the conveyance by Tyler, the plaintiff's assignor, to the defendant, contained a covenant of seizin, which, on the assumption that the grantor had no title, was broken as soon as it was made, it may be, as is argued by the defendant's counsel, that a defense *pro tanto* against these securities would have been established. It is clear that a cause of action against Tyler for a breach of covenant would have arisen. But Tyler was not a party to this action, so that the last mentioned question did not arise.

An important question would be presented if the merits of this action were before us, namely, whether the contract referred to did contain a present release of the right to draw water through what is called the old race. After an attentive consideration of its provisions, I am of opinion that it did not. Coleman, and those interested with him, had the right to open a new race. When such new race should be constructed, the release of the rights connected with the old one was to take effect. These rights were released to take effect when the new race should be completed. This was to be done in one year from the date of the instrument. The sale of these water rights appertaining to the old race, by Tyler, to the defendant, was made ten years after the contract; but the substituted race had never been constructed. I am of opinion that the right to draw water through the old race had not been extinguished; and I

am happy thus to find that no substantial benefit has been lost to the defendant by the inartificial manner in which the case in the present action was prepared.

The judgment must be affirmed.

BROWN, J. [After stating the facts.]—The only question upon the merits presented by this appeal is the right of the defendant to set up a failure of the title to the mortgaged premises, or to a part of them, in an action to foreclose a mortgage given for purchase money where there is no fraud and there has been no eviction or disturbance of the defendant's possession. This question has been decided in the negative in the cases of Abbott *v.* Allen, 2 *Johns. Ch.* 519; Leggett *v.* McCarty, 3 *Edw.* 124; Edwards *v.* Bodine, decided in the court of errors, 26 *Wend.* 109.

The defendant's counsel takes a distinction in cases when the breach complained of is of the covenant of warranty and of the covenant of seizin, claiming that when the breach is of the latter kind it may be set up as a defense in whole or in part to the action. The authorities referred to do not recognize any such distinction. In the first named case the chancellor says, in substance, that the court will not proceed to try the validity of an outstanding claim in the absence of the party in whom it is supposed to reside, nor will he be brought into court against his will to assert or renounce a title which he never asserted, or perhaps never thought of. There is no such practice or doctrine of the court. A previous eviction, or trial at law, is, as a general rule, indispensable.

It is not worth while to consider and determine the defendant's exceptions to the rulings of the referee upon the evidence, because, by the disposition of the defense upon the merits, they cease to be of any consequence.

The judgment of the general term should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

FARNHAM *v.* MALLORY.

September, 1867

One who has covenanted with executors, as such, that third persons shall satisfy and discharge a mortgage, is thereby estopped from denying the right of the executors to sue on such covenant, in their representative capacity.

In such an action, their interest in the enforcement of the covenant may be assumed.

In an action upon a covenant of guaranty by which the covenantor became surety for the punctual payment of the bond of other persons, and undertook that, if default be made by them, he would pay and fully satisfy the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plaintiffs the amount due, but that he should pay and satisfy, or cause to be paid and satisfied of record the mortgage mentioned, within thirty days from the date of the judgment, or, in the event of his not doing so, then that he pay to the plantiffs the amount.

George Farnham and Henry Wombough, executors of William Wombough, deceased, brought this action in the supreme court, against William M. Mallory, on a guaranty by Mallory of a bond given by the defendant, together with one Hiram W. Bostwick, to the plaintiffs, conditioned for the payment and discharge of a mortgage made by one Robert Miller, which was a lien on lands conveyed to the decedent by the defendant Mallory. The facts are more fully stated in the opinion of the court.

The following is a copy of the complaint, omitting mere details:

"The complaint of the plaintiffs respectfully shows, that before the making of the bond or written obligation hereinafter set forth, to wit, on or about January 26, 1847, Lauren Mallory, one of the obligees in said bond named, sold and conveyed to William Wombough, then of the town of Addison, by warrantee deed dated on that day, all &c. [describing certain pieces of land].

"That before the time of the sale and conveyance aforesaid, to wit, on or about September 6, 1831, one Robert Miller (who

was at that time the owner of the land hereinbefore described) executed and delivered to Isaac Bronson a mortgage upon said land, to secure the payment to said Bronson of the sum of thirty-five hundred dollars, which mortgage was at the time of the sale and conveyance aforesaid, a subsisting and valid lien and incumbrance upon the land aforesaid. That the said Lauren Mallory, at the time of the sale and conveyance aforesaid, promised and agreed with the said William Wombough, that he would, within six months thereafter, pay, satisfy, and cause to be discharged of record, the said mortgage aforesaid. That in consideration of the sale and conveyance aforesaid, and the promise or agreement aforesaid made by the said Lauren Mallory to pay, satisfy, and discharge of record as aforesaid, the mortgage aforesaid, the said William Wombough paid to said Lauren Mallory a large sum of money, to wit, about the sum of eleven thousand dollars. That the said William Wombough died on or about the 21st of May, 1853, leaving a will wherein he nominated and appointed the above named George Farnham and Henry Wombough executors of his last will and testament, who did, before the making of the said bond or writing obligatory by Lauren Mallory and Hiram W. Bostwick, hereinafter set forth, duly qualify and enter upon the discharge of the duties of executors of the said last will and testament of the said William Wombough, deceased. That the said Lauren Mallory neglected to pay, satisfy, or discharge the mortgage aforesaid, but the same still remained a valid and subsisting lien and incumbrance upon the land aforesaid at the time of the making of the said bond or writing obligatory hereinafter set forth.

"And the complaint further shows that the said Lauren Mallory and Hiram W. Bostwick, for the purpose of securing to the plaintiffs in this action, executors as aforesaid, the payment, satisfaction, and discharge of the mortgage aforesaid, which still remained a lien and incumbrance as aforesaid, and for a valuable consideration made, executed and delivered to the plaintiffs aforesaid on the 26th of June, 1854, their bond or writing obligatory in words and figures following, to wit: [The bond is found in the opinion of the court.]

"And the complaint further shows that, for the purpose of

securing to the plaintiff's executors as aforesaid, the punctual payment of all moneys, and a full performance by the said Lauren Mallory and Hiram W. Bostwick of all the conditions and covenants mentioned in the bond or writing obligatory made by the said Lauren Mallory and Hiram W. Bostwick, and hereinbefore set forth, and for a valuable consideration, the said defendant William M. Mallory did, on the 26th day of June 1854, make, execute, and deliver to the plaintiff's executors, as aforesaid, his written guarantee, which guarantee was annexed to said bond or writing obligatory as aforesaid, and was in words, &c. [This instrument is also set forth in the opinion of the court.]

"And the complaint further shows that the said Lauren Mallory and Hiram W. Bostwick have not, nor has either of them, paid or caused to be paid or satisfied of record the said mortgage, or any part thereof, nor has the said defendant, William M. Mallory, paid or caused to be paid or satisfied of record the mortgage aforesaid, although often requested so to do, but the same still remains a valid and subsisting lien and incumbrance upon the land aforesaid.

"Wherefore the plaintiff's executors, as aforesaid, demand judgment of this court that the defendant pay and satisfy, or cause to be paid and satisfied of record, the mortgage aforesaid or that he be adjudged to pay to the plaintiffs the sum of seven thousand dollars, or such sum as may be sufficient to pay and satisfy of record the mortgage aforesaid, or such other and further relief and judgment as the court shall see fit to grant, with costs."

George T. Spencer, for plaintiff, appellant;—That this must be deemed an equitable action, cited Goulet *v.* Asseler, 22 *N. Y.* 225, 228; Cole *v.* Reynolds, 18 *Id.* 74, 76; Reubens *v.* Joel, 13 *N. Y.* (3 *Kern.*) 493; McCarty *v.* Edwards, 24 *How. Pr.* 236 Heywood *v.* City of Buffalo, 14 *N. Y.* (4 *Kern*) 534, 540; Mut. Benefit Life Ins. Co. *v.* Supervisors, &c., of N. Y., 2 *Abb. Pr. N. S.* 233, 416; *Code*, §§ 128, 129, 253, 254, 141, 144, 274; Hubbard *v.* Eames, 22 *Barb.* 597; Gilbert *v.* Averill, 15 *Id.* 20. Hence the relief was limited by the prayer of the complaint. Gen'l Mut. Ins. Co.

v. Benson, 5 *Duer*, 168, 175; Craig *v.* Hyde, 24 *P. R.* 313; Livingston *v.* Painter, *Id.* 231; Simonson *v.* Blake, 20 *Id.* 484; Marquat *v.* Marquat, 12 *N. Y.* (2 *Kern.*) 336, 341; Walter *v.* Bennett, 16 *N. Y.* 250; Lane *v.* Beam, 19 *Barb.* 51; Hess *v.* Buffalo & Niagara Falls R. R. Co., 29 *Id.* 391; Walton *v.* Walton, 32 *Id.* 203. The complaint was insufficient. Buck *v.* Buck, 11 *Paige*, 170; Carpenter *v.* Stilwell, 3 *Abb. Pr.* 459–60; Boyce *v.* Brown, 7 *Barb.* 80, 85; *Adams Eq.* 78; 2 *R. S.* §§ 12, 16; Merritt *v.* Seaman, 6 *N. Y.* (2 *Seld.*) 168; Sheldon *v.* Hoy, 11 *How. Pr.* 11; White *v.* Joy, 13 *N. Y.* (3 *Kern.*) 83; Bangs *v.* McIntosh, 23 *Barb.* 591; Welland Canal Co. *v.* Hathaway, 8 *Wend.* 480; First Baptist Soc. *v.* Rapalee, 16 *Id.* 605; Chouteau *v.* Suydam, 21 *N. Y.* 179; Parsons *v.* Lyman, 20 *Id.* 103; Newton *v.* Bronson, 13 *Id.* 587; 10 *Paige*, 445–454. Isaac Bronson was a necessary party. Authorities above, and Wells *v.* Smith, 7 *Abb. Pr.* 261; Wandle *v.* Turney, 5 *Duer*, 661.

J. W. Dininny, for defendants, respondents;—Cited 9 *How. Pr.* 251; 10 *Id.* 48; 14 *Id.* 460; 16 *Barb.* 281; 1 *Sandf.* 168; 28 *Barb.* 602; Merritt *v.* Seaman, 6 *N. Y.* (2 *Seld.*) 168; White *v.* Joy, 13 *Id.* (3 *Kern.*) 83; 14 *Cobb*, 80; Cutler *v.* Wright, 22 *N. Y.* 472.

BY THE COURT.—DAVIES, Ch. J.—The plaintiff's claim in this action is based upon a guarantee of a bond made by Lauren Mallory and Hiram W. Bostwick to the plaintiffs, in these words:

"Know all men by these presents, that we, Lauren Mallory and Hiram W. Bostwick, of Corning, Steuben county, New York, are held and firmly bonded unto George Farnham and Henry Wombough, both of Addison, Steuben county, New York, executors of the last will and testament of William Wombough, deceased, late of Addison, in said county of Steuben, in the sum of seven thousand dollars, lawful money of the United States of America, to be paid to the said George Farnham and Henry Wombough, executors, as aforesaid, the survivors or survivor, or his or their assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and admin-

trators, jointly and severally, firmly by these presents. Sealed with our seals, dated the 26th day of June, in the year 1854.

"The condition of this obligation is such, that if the above bounden Lauren Mallory and Hiram W. Bostwick, their heirs, executors, or administrators, shall well and truly pay and satisfy of record, or cause to be fully paid and satisfied of record, and fully discharge a certain indenture of mortgage made and executed on the sixth day of September, 1831, by Robert Miller to Isaac Bronson, then of the city of New York, to secure the payment of the sum of three thousand five hundred dollars and interest, which mortgage is on the lands conveyed to said William Wombough, now deceased, by the said Lauren Mallory and his wife, by deed, bearing date the 26th day of January, in the year 1847, which lands are situated in the town of Big Flatts, Chemung county, New York, and which mortgage is duly recorded in Chemung county clerk's office, and which is to be paid, satisfied, and discharged by the above bounden Lauren Mallory and Hiram W. Bostwick, as follows, viz.:

"One thousand dollars and all of the interest on said three thousand five hundred dollars due on the first day of July, 1855, is to be paid to apply as a payment on said mortgage, on the first day of July, 1855, and all that shall remain unpaid, after making the said payment, on the first day of July, 1855, as aforesaid, of the said sum of three thousand five hundred dollars, together with all the interest thereon, shall be fully paid on the first day of July, 1856, and the mortgage shall be fully satisfied and discharged on the same first day of July, 1856, so that it shall be no longer a lien or incumbrance on said lands, nor of any force or effect, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue."

The defendant, William M. Mallory, on June 26, 1854, did make, execute, and deliver to the plaintiffs, as executors, as aforesaid, his written guarantee of said bond or obligation, and which was annexed to said bond, and is in these words:

"For and in consideration of the sum of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I do hereby become surety for the punctual payment of all moneys, and full performance of all the conditions and covenants in the

annexed bond mentioned, to be paid, done, and performed by Lauren Mallory and Hiram W. Bostwick, and if any default shall be made by them, or if they shall refuse or neglect to fully pay or fulfill all or any of the payments, or perform all or any of the conditions mentioned in said bond, at any time, I hereby agree to pay and fully satisfy and discharge the mortgage mentioned in said bond, and fully perform in every respect all of the agreements and conditions mentioned in said bond, and at and within the time therein stated."

The complaint averred that on or about January 26, 1847, the said Lauren Mallory sold and conveyed to the said William Wombough, by a warranty deed of that date, certain pieces and parcels of land therein described. That before said sale and conveyance, to wit, on or about September 6, 1831, one Robert Miller, who was at the time the owner of said lands, executed and delivered to Isaac Bronson a mortgage upon said lands to secure the payment to said Bronson of the sum of three thousand five hundred dollars, which mortgage was, at the time of the sale and conveyance aforesaid, a subsisting and valid lien and incumbrance upon the said land. That said Lauren Mallory, at the time of the sale and conveyance aforesaid, promised and agreed with the said William Wombough, that he would, within six months thereafter, pay, satisfy, and cause to be discharged of record the said mortgage.

That in consideration of the sale and conveyance aforesaid, and the promise or agreement aforesaid, made by the said Lauren Mallory to pay, satisfy and discharge of record aforesaid the said mortgage, the said William Wombough paid to the said Lauren Mallory about the sum of eleven thousand dollars. That the said William Wombough died on or about May 21, 1853, leaving a will, wherein and whereby he appointed these plaintiffs executors of his last will and testament, who did, before the making of the said bond or writing obligatory, by said Lauren Mallory and Bostwick, above set forth, duly qualify and enter upon the discharge of the duties of executors of said last will and testament. That the said Laureu Mallory had neglected to pay, satisfy, or discharge the mortgage aforesaid, and that the same still remained a valid and subsisting lien and incumbrance upon the lands aforesaid, at the time of the making

of the said bond or writing obligatory. The complaint further averred that said Lauren Mallory and Bostwick, for the purpose of securing to these executors, as aforesaid, the payment, satisfaction, and discharge of the mortgage aforesaid, which still remained a lien and incumbrance aforesaid, and for a valuable consideration, made, executed, and delivered to said plaintiffs said bond or writing obligatory. The complaint also averred, that for the purpose of securing the punctual payment of all the moneys, and the performance of all the conditions and covenants mentioned in said bond, by said Lauren Mallory and Bostwick, the said defendant made, executed and delivered to them the written guarantee therein set forth, and which has been already described.

The said complaint further averred that the said Lauren Mallory and said Bostwick had not, nor had either of them, paid, or caused to be paid, or satisfied of record, the said mortgage, or any part thereof; nor had the said defendant Mallory paid, or caused to be paid, or satisfied of record, the mortgage aforesaid, although often requested so to do, but that the same still remained a valid and subsisting lien and incumbrance upon the land aforesaid.

Wherefore, the plaintiffs demanded judgment that the defendant pay and satisfy, or cause to be paid and satisfied of record, the mortgage aforesaid, or that he be adjudged to pay the plaintiffs the sum of seven thousand dollars, or so much as may be sufficient to pay and satisfy of record the mortgage aforesaid, or such other relief and judgment as the court should see fit to grant.

To this complaint the defendant demurred, and assigned the following causes of demurrer.

1. That it does not appear by the complaint that the plaintiffs have legal capacity to sue as executors.

2. That there is a defect of parties in this, that the said Isaac Bronson is a necessary party, and is not made a party plaintiff herein.

3. That there is a defect of parties, in that the said Robert Miller is a necessary and proper party, and is not made a party defendant herein.

4. That there is a defect of parties, in that the said Lauren Mallory is a necessary and proper party defendant, and is not made a party defendant herein.

5. That there is a defect of parties, in that said Bostwick is a necessary and proper party defendant, and is not made a party defendant herein.

6. That said complaint does not state facts sufficient to constitute a cause of action.

7. That it appears by the said complaint that the plaintiffs are not entitled to the relief therein demanded.

8. That it does not appear in or by said complaint that letters testamentary or of administration have been issued to the plaintiffs, or at what time, or by what court or authority.

9. That it does not appear in or by said complaint that the plaintiffs, at the time of the commencement of the action, or at any other time, had any estate or interest upon the lands upon which said mortgage was a lien or incumbrance, or that the plaintiffs were in any way injured or prejudiced by the existence of said lien or incumbrance.

10. That it does not appear in or by said complaint that the defendant has had any notice of any breach of any of the conditions of the bond set forth in the complaint, of the refusal or neglect of the obligors therein to pay or fulfil all or any of the payments, or perform all or any of the conditions mentioned in said bond.

11. There is no sufficient breach of any of the conditions of said bond set forth in the complaint alleged therein.

12. There is no sufficient breach of the agreement of the defendant stated or alleged in said complaint.

Judgment was given for the plaintiffs, overruling said demurrer, at special term, unless the defendant, within thirty days, should answer on payment of costs. Said order, on appeal, was affirmed at general term.

The cause coming on again to be heard at special term, judgment was again rendered for plaintiffs for the amount then due upon the said bond and mortgage, amounting to the sum of three thousand six hundred and eighty-six dollars and forty-seven cents, and the costs of this action. And, upon

appeal to the general term, said judgment was affirmed, and the defendant now appeals to this court.

The supreme court correctly held that the grounds assigned in the demurrer interposed by the defendant presented no obstacle to the plaintiffs' recovery.

The engagement or contract of the defendant with these plaintiffs was absolute, that in the event Lauren Mallory and Bostwick should fail in the performance of their covenants, then the defendant agreed to pay and fully satisfy and discharge the said mortgage to Isaac Bronson, and fully perform in every respect all the covenants and agreements contained in the bond of Lauren Mallory and Bostwick on their part to be done and performed.

The prayer of the complaint was that the defendant should pay and satisfy, or cause to be paid and satisfied, the said mortgage to Isaac Bronson, or should be adjudged to pay to the plaintiffs a sum sufficient to pay and satisfy of record the said mortgage.

As already observed, the judgment of the supreme court is that the defendant should pay absolutely to the plaintiffs the amount of the said judgment. In this I incline to think that court erred, and that the judgment should have been that the defendant should pay and satisfy, or cause to be paid and satisfied of record, the said mortgage to Isaac Bronson, within thirty days from the date of said judgment, or, in the event of his not doing so, then that he pay to the plaintiffs the amount of the said judgment.

With this modification, I am for the affirmance of the judgment, with costs.

BOCKES, J.—This is an appeal from the judgment of the supreme court, in favor of the plaintiffs, on demurrer to the complaint.

The case made by the complaint is as follows: Lauren Mallory owned lands, on which there was a mortgage lien of three thousand five hundred dollars.

He sold and conveyed the lands to William Wombough, by warranty deed, and agreed with the latter to assume, pay off,

and discharge the mortgage. Wombough died, and the plaintiffs were appointed his executors. For the purpose of securing performance of the agreement, to satisfy the mortgage, Mallory, with Hiram W. Bostwick as his surety, made a bond to Wombough's executors, in the penal sum of seven thousand dollars, conditioned that they would satisfy and discharge the mortgage by installments—the last one to be paid on July 1, 1856.

The defendant thereupon, and by a separate instrument, under seal, became surety for Mallory and Bostwick, and agreed that in case they should neglect or refuse to fulfill the condition of the bond, he would perform it according to its terms.

All the parties having omitted performance of the condition, this action was instituted to enforce the defendant's obligation.

The facts above cited are all alleged in the complaint, and very manifestly show a good cause of action.

The case, briefly stated, is this: The defendant covenanted and agreed with the plaintiffs that Mallory and Bostwick should satisfy and discharge the mortgage. They omitted to do so, as did also the defendant; the latter was, consequently, in default on his agreement.

The supreme court was very clearly right in giving judgment for the plaintiffs on the demurrer.

Nor was the complaint open to any technical or formal objection as a pleading.

The plaintiffs were authorized to maintain the action as executors. It is averred that William Wombough was dead, and that they had been duly appointed the executors of his will and testament; and it also appears that the bond and instrument of suretyship were made to them as such executors. The defendant, having made the agreement with them as executors, is estopped from denying their right to bring the action in their representative capacity; and it must be assumed, too, that they have an interest in the enforcement of the agreement. The defendant, by his agreement, was under personal engagement to them as executors; and having broken his covenant with them, they could enforce his liability.

The only difficulty in the case is in the form of the judgment.

The judgment, as entered, is absolute—that the plaintiffs recover the amount remaining unpaid on the mortgage, to wit, three thousand six hundred and eighty-six dollars and forty-seven cents, with interest from October 4, 1858.

There is no security that the plaintiffs will appropriate the recovery to the payment of the mortgage debt.

If collected by them, they may refuse, or become unable to satisfy the debt with the money, and leave the bond to be enforced against the obligor.

There should be a provision in the judgment to meet this contingency.

If the executors had, in fact, paid off the debt and satisfied the lien, there would be then no difficulty; their recovery should then be absolute for the amount paid.

But this they have not done. They have yet suffered no damage, and the action is brought with a view to protect them (and those interested through them in having the agreement fulfilled) from injury.

The action is for a specific performance of personal covenants—a specific performance of an agreement of indemnity.

There was no difficulty, consequently, in so framing the judgment or decree as to meet the requirements of the case, and protect the rights of all interested in the subject matter of the action, although not parties.

The judgment should have been to the effect that the defendant specifically perform his covenant and agreement, by satisfying and discharging the mortgage within a time to be specified, or, in default thereof, the plaintiffs recover judgment against him for the sum remaining unpaid on the mortgage; that judgment be forthwith docketed against him for such amount, to stand as security and to be enforced by execution, in case of his neglect to satisfy and discharge the mortgage within the time specified; that, in case of sale or collection under execution, the sheriff bring the amount collected into court to abide its order, and that the plaintiffs be at liberty to apply to the court for further relief, if necessary. Also that

the plaintiffs recover the costs and disbursements of the action.

This, in my judgment, should have been the form of the decree.

I am therefore of the opinion that the judgment of the supreme court in favor of the plaintiffs, on the demurrer to the complaint, should be affirmed, with costs, but with a modification of the details in accordance with the above suggestions. And in my judgment the defendant should be charged with the costs on the appeal to this court. The litigation is without excuse on his part.

His agreement was clear and specific, and for aught that appears, was fairly and understandingly entered into.

It should have been faithfully performed.

The modification now suggested is formal merely, and is to meet a contingency which may arise in case of justification by him in his unfaithfulness. He should therefore reap no benefit from it.

The judgment against him is in effect affirmed, and it should, as I think, be with costs of appeal.

FIELDEN *v.* LAHENS.

September, 1867.

Modifying 9 *Bosw.* 436.

Inasmuch as it is no part of the business of a mercantile firm to make or indorse notes, as a firm, for third persons, there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership have no interest; and one who takes such paper, so indorsed, with notice that the indorsement was made for the accommodation of the one partner who made it, cannot hold the other partners liable upon it.

A finding of a referee of the fact of notice that certain indorsements were accommodation indorsements, if based on the possession of the notes by the maker, and his delivery of them with such indorsements for his own benefit, may be regarded as a conclusion of law, and is therefore open to examination in the court of appeals.*

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* Compare Farnham *v.* Hotchkiss, p. 95 of this vol.

Fielden *v.* Lahens.

The fact that the maker of a note holds and puts it into circulation for his own advantage, is notice to the party taking it that whatever indorsements may be upon it were made for his benefit, and not in the course of business.

In an action against partners a separate judgment may be entered against those who are found liable, while the plaintiff is nonsuited as to those who are not liable.

In an action at law, after the plaintiffs have closed their case, it is discretionary with the referees whether to allow them to open it and introduce evidence, not rebutting, but competent and proper, in the first instance, to make out their case; and their decision on this point is not subject to review on appeal.

An objection to the competency of a witness whose deposition is offered in evidence, is to be determined by the law as it stands at the time of the trial, not by the law as it was when the deposition was taken.

Thomas Fielden and others sued Pierre François Lahens and others in the superior court of the city of New York, on October 21, 1844. The complaint was against the defendants, as alleged indorsers of three promissory notes, all dated May 25, 1844, two of them payable at ninety days, and one at sixty days from date; one for fourteen thousand dollars, one for thirteen thousand five hundred dollars, and the third for twenty-one thousand two hundred and twenty-one dollars and forty-three cents, making in all forty-eight thousand seven hundred and twenty-one dollars and forty-three cents. They were in the common form, signed by Alexander Caselli, as maker, and indorsed with the name of J. Lahens, &c.

The defendant, Louis Emile Lahens, appeared by one attorney, and the defendants, Pierre François Lahens and Edward Ernest Lahens, by another, and put in separate pleas of the general issue, and the cause was referred to three referees, who, upon the trial, which commenced February 4, 1858, nonsuited the plaintiffs.

After the plaintiffs had closed their testimony, and testimony on behalf of the defendants had been given, and a motion for nonsuit had been made, and granted by the referees, plaintiffs' counsel proposed to examine one of the defendants, stating that plaintiffs subpœnaed him to produce the articles of partnership. Being required to state what they intended to prove, counsel replied: "We intend to prove what was the authority

conferred on Louis E. Lahens by his copartners, we ourselves not knowing what that authority was." The referees decided that the statement was insufficient, and excluded the evidence.

In the course of the trial a deposition of one Caselli, who was pecuniarily interested in the action, and which had been taken on commission in 1845, was produced and read, against the objection of the plaintiffs, who insisted that the witness being incompetent from interest at the time he was examined, his deposition could not now be read.

The referees found, *First.* That at the time of the making of and indorsing of the promissory notes in the declaration in this action set forth, Joshua Fielden, John Fielden, James Fielden, Thomas Fielden, Daniel Campbell and William C. Pickersgill were copartners in trade under the respective firms of Fielden Brothers & Co., at the city of Liverpool, in England, and of W. C. Pickersgill & Co., at the city of New York; that the said Joshua Fielden, John Fielden and James Fielden have since departed this life, and that the said Thomas Fielden, Daniel Campbell and W. C. Pickersgill have survived them; also, that at the time of the making and indorsing of the said promissory notes, Pierre François Lahens, Edward Ernest Lahens, Edward Gaudard and Louis Emile Lahens were copartners in mercantile business at Havre, in France, and at the city of New York, respectively, under the firm of J. Lahens & Co.; that the said Louis Emile Lahens was the only one of said copartners then residing in the city of New York, or in the United States; that the said Edward Gaudard has since departed this life, and that the defendants in this action have survived him.

Second. That the indorsements of the name of J. Lahens & Co. upon the said promissory notes were made and executed in the city of New York by the defendant, Louis Emile Lahens, one of the members of said firm, and delivered by him to Alexander Caselli, the maker of the said notes, in said city, for the accomodation of said Alexander Caselli, and that no consideration was received by the said J. Lahens & Co. for the same.

Third. That the notes so indorsed were delivered by the said Alexander Caselli, the maker thereof, to the said firm of W. C. Pickersgill & Co., at the said city of New York.

Fourth. That the said W. C. Pickersgill & Co., by the fact of such possession and delivery of the said notes to them by the maker thereof, after the same had been so indorsed with the name of said J. Lahens & Co., had notice that the said J. Lahens & Co. had received no value therefor, and that the said indorsements were made for the benefit and accommodation of the maker of the said notes.

Fifth. That the plaintiffs had failed to prove the joint liability of the defendants. They further reported that, upon the said facts so found, as a conclusion of law, the plaintiffs, having so failed to prove a joint liability of all the defendants, cannot recover in this action against the said defendants, or against any or either of them.

And we do therefore decide and determine that all the defendants are entitled to judgment against the plaintiffs, and for their costs.

The judgment entered upon the report of the referees was affirmed by the superior court at general term. 9 *Bosw.* 436. Plaintiffs appealed.

Jeremiah Larocque, for plaintiffs, appellants;—Cited *Code*, §§ 136, subd. 3; 169; 274; 459, subd. 2; Brumskill *v.* James, 11 *N. Y.* (1 *Kern.*) 294; Marquat *v.* Marquat, 12 *Id.* (2 *Kern.*) 336; Pruyn *v.* Black, 21 *Id.* 30; McIntosh *v.* Ensign, 28 *Id.* 169; Claflin *v.* Butterfly, 5 *Duer*, 327; McKenzie *v.* Farrell, 4 *Bosw.* 192; Marine Bank *v.* Clements, 31 *N. Y.* 44; Goodman *v.* Simmons, 20 *How. U. S.* 343; Boyd *v.* Cummings, 17 *N. Y.* 101.

Charles O'Conor, for the respondents, P. F. and E. E. Lahens, —as to the merits;—Cited and commented on Farmers' Bank of Kent *v.* Butchers' & Drovers' Bank, 16 *N. Y.* 135; New York Fire Ins. Co. *v.* Bennett, 5 *Conn.* 580; Bank of Rochester *v.* Bowen, 7 *Wend.* 159; Foot *v.* Sabin, 19 *Johns.* 156; Laverty *v.* Burr, 1 *Wend.* 529; Boyd *v.* Plumb, 7 *Id.* 310; Stall *v.* Catskill Bank, 18 *Id.* 478; Bank of Vergennes *v.* Cameron, 7 *Barb.* 143; Bank of Genesee *v.* Patchin Bank, 13 *N. Y.* (3 *Kern.*) 316, 321; S. C. 19 *Id.* 314, 319; Vallett *v.* Parker, 6 *Wend.* 622. As to the discretionary power of referees in the

admission of evidence;—Adams *v.* Bankart, 1 *Crompt. M. & R.* 681, 682; Thomas *v.* Fleury, 26 *N. Y.* 31; Ford *v.* Niles, 1 *Hill*, 300; Leland *v.* Bennett, 5 *Id.* 288, 289; Vallett *v.* Parker, 6 *Wend.* 622; Smith *v.* Paton, 31 *N. Y.* 66; Davis *v.* McCready, 17 *Id.* 235; Mead *v.* Bunn, 32 *Id.* 279; Woodruff *v.* McGrath, *Id.* 260; Williams *v.* Hayes, 20 *Id.* 60; Alexander *v.* Byron, 3 *Johns.* 319; Middleton *v.* Barned, 18 *Law J. Exch. N. S.* 435; 4 *Welsby & H. Exch.* 243; Kolle *v.* People, 9 *Abb. Pr. R.* 16.

Coudert Brothers, for the respondent, Louis E. Lahens,—cited Ackley *v.* Tarbox, 31 *N. Y.* 565.

J. M. PARKER, J. [After stating the facts.]—The questions considered and decided by the referees, as their report shows, were: first, whether the firm of J. Lahens & Co. were liable upon the indorsements; and second, whether, if it was not, a separate judgment could be rendered in the action against Louis Emile Lahens, who made the indorsement.

The facts found, bearing upon the first question, are that the firm of J. Lahens & Co. was a mercantile firm; that Louis Emile Lahens, one of the copartners, made the indorsements in the name of the firm, for the accommodation of the maker, without consideration to the firm; that the plaintiffs received the notes, so indorsed, from the hands of the maker, and that by the fact of their so receiving them, they had knowledge that the firm of J. Lahens & Co. had received no value therefor, and that the indorsements were made for the maker's accommodation.

These facts undoubtedly warrant the conclusion of law that the firm was not liable upon the indorsement.

The principle of the cases is, that inasmuch as it is no part of the business of a mercantile firm to make or indorse notes, as a firm, for third persons, there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership has no interest, for such purpose, and that the holder of such paper, so indorsed, who takes it with notice that the indorsement was made for the accommodation of the maker, cannot hold the firm liable upon it. Stall *v.* Catskill Bank, 18 *Wend.* 466, 477, 478; Bank of Rochester

v. Bowen, 7 *Id.* 158; Joyce *v.* Williams, 14 *Id.* 141; Gansevoort *v.* Williams, *Id.* 133; Austin *v.* Vandermark, 4 *Hill*, 259.

The finding that the plaintiffs had notice of the fact that the indorsements were mere accommodation indorsements, it is insisted by the plaintiff's counsel, is but a conclusion of law, and not a finding of fact, and is, therefore, open to examination. Inasmuch as the fact of notice is based upon the facts of the possession of the notes by the maker, and his delivery of them, bearing the indorsement of J. Lahens & Co., to the plaintiffs, thereby using them for his own benefit, the question of the legal sufficiency of such facts to constitute notice to the plainiiffs is undoubtedly involved in the finding. Treating it, therefore, as a conclusion of law, from the facts distinctly found and necessarily inferred, I think the referees right in their conclusions.

It was said by the chancellor, in Stall *v.* Catskill Bank (18 *Wend.* 466, 478), "If the drawer of a note carries it to a bank to get it discounted on his own account, or transfers it to a third person, with the name of a firm indorsed thereon, the transaction on its face shows that it is a mere accommodation indorsement, or the note would not be in the hands of the drawer; and the bank, or person who receives it from the drawer, being thus chargeable with notice that the firm are mere sureties of the drawer, and that it has not passed through their hands in the ordinary course of partnership business, the members of the firm who have been made sureties without their consent are not liable to such holder of the note."

This statement of the rule is, I think, substantially correct. The note being held by the maker, and put into circulation by him, in his own business, and for his own advantage, is evidence to the party taking it that whatever indorsements may be upon it were made for the maker's benefit, and not in the ordinary course of business; for, in the ordinary course of business, it would have passed from the maker to the payer and indorser. The party receiving it, therefore, from the maker, in payment of the maker's debts, assumes the risk of being able to show that the indorsement was in the usual course of business, and that the partners all consented to the act of the one who made the indorsement. As between the firm and the holder of the paper, this is but a reasonable rule. The partners are liable to

a *bona fide* holder *without notice* in such case, only because he has the right to presume that the indorsement was made in the usual course of the partnership business, and, therefore, within the scope of the authority of the individual member of the firm who made it. But when the circumstances are such as to inform the holder of the fact that the indorsement was not made in the course of the partnership business, such presumption is excluded; and it would be inequitable as well as illegal, as between the firm and the holder, for the court to presume the assent of the firm in favor of the holder thus notified. Austin *v.* Vandermark, 4 *Hill*, 259, 262; Bank of Vergennes *v.* Cameron, 7 *Barb.* 143.

The finding that the plaintiffs had notice that the indorsements were for Casseli's accommodation, being warranted, it follows that no judgment could be rendered upon them against the members of the firm, other than Louis Emile Lahens.

The next question is, could a several judgment be given against Louis Emile Lahens?

It was well settled at common law that in an action against several defendants, on an alleged joint contract, no recovery could be had against any of them, unless a joint contract made by all of them was established (Mitchell *v.* Ostrom, 2 *Hill*, 520).

The Code has changed this rule in respect to actions commenced since it took effect. Section 136 of the Code has this provision: "If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone." Section 274 has this: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants."

Section 8 restricts the application of that portion of the Code relating to civil actions to such as are commenced after July 1, 1848, except where otherwise provided.

By enactments in 1848 and 1849 certain sections of the Code were applied to suits commenced before it took effect, but sections 136 and 274 are not among the number so applied. In 1851 section 459 of the Code was amended so as to read as

follows: "The provisions of this act apply to *future proceedings* in actions or suits heretofore commenced and now pending, as follows: 1. If there has been no pleading therein, to the pleadings and all subsequent proceedings; 2. When there is *an issue* of law or *of fact*, or any other question of fact to be tried, *to the trial and all subsequent proceedings.*"

This section the learned court below held did not extend the provisions of sections 136 and 274 to suits pending when the Code went into operation. I confess I am differently impressed as to the effect of that section. It seems to me that it is within the scope and intent of its provisions to allow judgment to be taken against any or either of the defendants severally, when the plaintiffs would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them, as section 136 provides.

The proceeding for which the appellants contended,—the entry of a several judgment against Louis Emile Lahens,—is a proceeding in the action such as section 136 provides for, and the language of section 459 is clearly broad enough to apply section 136 to this case. Section 459, in effect, says that the trial and all subsequent proceedings, in actions brought before the Code took effect, in which an issue had been joined and not tried, are to be conducted in all respects as though the actions had been brought after the Code took effect.

Upon the trial of the case at bar came up the question, what was to be the course of proceedings? But one of the defendants being shown to be liable upon the indorsements, and two of the defendants not liable, under the Code, confessedly the thing to be done upon the trial, in such case, is to dismiss the complaint as to the two, and to render judgment against the one. Any other course in respect to the present case is a failure to apply the provision of the Code to the proceedings in the case, as section 459 requires.*

The injustice of an enactment which, in effect, deprives a defendant of a perfect defense to the action, and changes his right to recover costs into an obligation to pay them, is urged, as showing that the legislature could not have intended to ap-

* See McIntosh v. Ensign, 28 *N. Y.* 169.

ply the new rule in question to pre-existing suits. The defense insisted upon is a mere technical one, not founded on the merits, and the advantage which the defendant had under the old rule, a mere adventitious one dependent upon a then existing rule of practice or proceeding,—a mere *formal* proceeding,—a *mode* of arriving at a result,—the judgment to which the plaintiffs have shown themselves entitled,—such advantages are not usually deemed entitled to protection, upon a legislative change of modes of proceedure.

Thus, prior to the Code, a variance upon the trial between the allegation in a pleading and the proof might be fatal to the plaintiffs' case, which, under section 169 of the Code, would be disregarded. If the plaintiff, in an action commenced prior to the Code, had made an actual averment in his declaration, *that* gave the defendant an advantage which would have operated as a defense, and entitled him to costs; and yet the legislature, by the act of April 11, 1849, ch. 438, expressly apply section 169 of the Code to actions pending when the Code took effect; by which section, such inaccuracy, which, as it stood, effectually shielded the defendant from a recovery against him, might be deemed immaterial and wholly disregarded..

Again, in an action before the Code, a party defendant could not be required to give evidence in favor of his adversary, and so stood secure against a judgment when he and the plaintiff were the only depositaries of the facts on which the cause of action depended. This was a technical advantage of which the legislature did not hesitate to deprive him by the same act of 1849, when it provided that section 390 of the Code, which allows a party to an action to be examined as a witness at the instance of the adverse party, should apply to the pre-existing suits.

It is difficult to see any more injustice done the defendant in the application of section 136 to pre-existing suits, than in the application to them of sections 169 and 309, and various other sections especially applied by the act of 1849, having a similar effect.

The advantages held by parties in those suits, depending not upon rights, but upon remedies, the legislature seems not to have been careful to protect, but, on the contrary, quite ready

to disregard, in providing for uniformity of proceedings in suits, the question whether they were commenced before or after the Code. So that it would not be safe, I think, to infer that there could have been no intent through section 459 to apply section 136 to pre-existing suits.

The exception to the exclusion of the defendants' articles of copartnership cannot be sustained. It cannot be pretended that, under the rules governing trials at law, the plaintiffs were, after having closed their case, entitled to open it and introduce evidence, not rebutting, but competent and proper in the first instance to make out their case. The referees had the right, in their discretion, to admit or exclude this evidence, and their decision is not subject to review upon appeal.

The referees decided correctly in admitting the deposition of Caselli. It was taken upon a commission in 1845, upon an examination in which the parties joined. So far as appears, the commission and return were regular, and there was no objection to the examination when taken. If the witness was then incompetent on the ground of interest, that might have been good cause of objection to the commission. No objection, however, so far as appears, was then made. But that he was interested was no ground of exclusion when the testimony was offered on the trial. He was then a competent witness, and his evidence was properly received.

The judgment of the court below is right as to the defendants Pierre François Lahens and Edward Ernest Lahens, and to that extent should be affirmed, with costs.

But as to Louis Emile Lahens, inasmuch as it appears that the plaintiffs were nonsuited as to him, not because they failed to show him liable, but because the other defendants were not jointly liable with him, the judgment is erroneous, and should be reversed, and a new trial granted, costs to abide the event.

A majority of the judges concurred.

Judgment affirmed, with costs, as to P. F. Lahens and E. E. Lahens, and reversed as to L. E. Lahens; and new trial ordered, costs to abide event.

FILLO *v.* JONES.

December, 1868.

It seems, that the mere fact that the keeping, by defendant, of explosive substances within the city limits, in violation of a municipal ordinance, is not such a wrongful act as to render defendant liable, in damages, under the statute, for a death caused by the explosion of such substances, but that negligence or a common law nuisance must be shown.*

In an action for damages caused by the explosion of fireworks alleged to have been wrongfully kept by defendant within the city limits, evidence that other fires had occurred from fireworks, at other times, and on the premises of other persons, in no way connected with the issue, is inadmissible, at least without proof that the fireworks and the conditions of ignition were similar.

The particular character of the fireworks on defendant's premises not having been proved except that they were colored signal lights, bought of the maker at a specified time, evidence that red and green signal lights bought of the same maker two years afterward, were liable to spontaneous combustion, is inadmissible, in the absence of any other proof of similarity.

In such an action, proof that the fire marshal of the city had received an anonymous warning of the dangerous nature of defendant's establishment, is inadmissible.†

The rule that an exception to the admission of evidence cannot be sustained, unless the objection stated the ground thereof, does not apply where the evidence was improper, for obvious reasons which could not by any means have been removed.

Christina, executrix of John Fillo, deceased, sued Thomas J. Jones, in the supreme court, under the statute, for damages caused by the death of the deceased, which resulted from an explosion of fireworks on defendant's premises. Defendant, a dealer in gunpowder and fireworks, had a quantity of fireworks,

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* The case of Brown *v.* Buffalo, &c. R. R. Co., 22 *N. Y.* 191, cited by the court on this point, has been recognized in Reinhard *v.* Mayor, &c. of N. Y., 2 *Daly*, 243; and in Williams *v.* O'Keefe, 9 *Bosw.* 536; but in so far as it holds that the penalty is the only result of the violation, it is much shaken, if not overruled, by Jetter *v.* N. Y. & Harlem R. R. Co., reported in this volume.

† Compare Hadencamp *v.* Second Ave. R. R. Co., 1 *Sweeny*, 490.

As to liability for explosions, see Furth *v.* Foster, 7 *Robt.* 484; Spelman *v.* Fisher Iron Co. 56 *Barb.* 151.

&c., in his store, at 16 John-street, in the city of New York. Among them were some which were described in the testimony on the trial as "colored signal lights." On August 25, 1865, his store took fire, by reason, as plaintiff alleged, of the spontaneous combustion of these signal lights, and John Fillo, a furrier, who occupied the upper part of the building, was burned so severely that he died in a few days. The plaintiff, to sustain her action, relied on testimony that fireworks, and particularly colored fires, were very liable to spontaneous combustion, and that keeping them in quantities in an inhabited place was dangerous; and that in this case the fire originated where the colored lights were kept, and that defendant stated to his insurers, that the fire was caused by their spontaneous combustion. She was also allowed to prove other cases of fires which had occurred in the city within a few years from the same cause. The ordinance of the corporation of the city prohibited the keeping of colored signal lights, on account of danger to life and property. The details of the evidence material to this appeal appear fully in the opinion.

Plaintiff recovered a verdict for five thousand dollars, which the supreme court set aside, and ordered a new trial, without however, assigning their reasons therefor.

Plaintiff appealed to this court.

Henry E. Davies and *George W. Hoxie*, for appellants;—That on the facts found by the jury, plaintiff was entitled to recover; cited, Thomas *v.* Winchester, 6 *N. Y.* (2 *Seld.*) 397, and cases there cited; Haley *v.* Earle, 30 *N. Y.* 208; Driscoll *v.* Newark Cement Co., 37 *N. Y.* 637. That the exceptions were not specific, and therefore not available. Shaw *v.* Smith, 1 *Trans. App.* 238. That evidence of previous fires was admissible to show that colored lights were subject to spontaneous combustion. Sheldon *v.* Hudson River R. R. Co., 14 *N. Y.* (4 *Kern.*) 218; Hinds *v.* Barton, 25 *N. Y.* 544. That the anonymous letter could not prejudice defendant, and therefore its admission was not ground for a new trial. Hyde *v.* Lathrop, 3 *Trans. App.* 320.

W. F. Allen, for defendant, respondent;—That the violation

of the ordinance was solely a ground for a penalty. Williams *v.* O'Keefe, 9 *Bosw.* 536; Brown *v.* Buffalo, &c. R. R. Co., 22 *N. Y.* 191, 199. That defendant was not liable. Stuart *v.* Hawley, 22 *Barb.* 619; Rockwood *v.* Wilson, 11 *Cush.* 221, 226.

DWIGHT, J.—It is not claimed on the part of the plaintiff, that the keeping and storing of the fireworks in contravention of the city ordinance, was, for that reason alone, such an unlawful act as to bring the case within the statute authorizing a recovery; and upon the authority of Brown *v.* Buffalo & State Line R. R. Co., 22 *N. Y.* 191, it seems that position would have been untenable. It became necessary, therefore, for the plaintiff to show, either that the defendant was guilty of negligence in the mode of keeping and storing, or handling those articles, or that such keeping and storing was of itself an unlawful act, at common law, because a common nuisance, dangerous to human life.

There was no evidence tending to show the former state of facts. So far as appears, these fireworks were put up, kept and handled by the defendant, in the ordinary manner, and with proper care and precaution against accidents. The theory of the plaintiff's case is, that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at all at the place where they were kept, because they were, in themselves, liable to spontaneous combustion and explosion, and thus endangered the lives of persons in their vicinity; and that the injury here complained of was occasioned by such spontaneous combustion or explosion of a portion of their fireworks.

I have no doubt that a cause of action might have been made out upon this theory, and that, upon the evidence admitted, it was partly a question for the jury whether it was not made out.

The motion for a new trial was therefore properly denied.

The question remaining is, whether there was error in the admission of evidence tending to establish this cause of action, by reason of which the defendant was entitled to the judgment of reversal pronounced at the general term.

The dangerous character above described was especially attributed to a particular kind of fire-works, known as "colored signal lights," of which there was evidence tending to show that

the defendant had a small quantity in his store at the time of the fire. The evidence on the part of the plaintiff was, therefore, largely directed to demonstrate the components and character of this particular kind of fireworks, and to prove that the fire in question originated in a spontaneous combustion of those in the defendant's store. With this view, probably, John A. Parker, Jr., a witness for the plaintiff, was permitted, under the defendant's objection, to testify to the circumstances of two fires which took place in the store of one J. B. Purdy, a dealer in fireworks, at No. 34 Maiden Lane, New York, in the year 1853, the first of which was put out without difficulty, and the second of which resulted in the destruction of the store and a loss of life. This witness was also permitted, under like objection, to testify that, in his opinion, those fires were both caused by spontaneous combustion of fireworks.

The objections to this testimony were general, not specifying particular grounds; but, in my opinion, they were sufficient, and were improperly overruled. The evidence was clearly inadmissible,—not because the witness was not shown to be qualified to give an opinion as to the cause of those fires, but because the whole matter of the cause, the occurrence and the effect of those fires, was wholly foreign to the issues in this action. The defendant was not called upon to try the question, what caused a fire in Maiden Lane twelve years before. It cannot be claimed that this evidence was admissible to show the character of the defendant's fireworks; there was no attempt to show that the fireworks in Purdy's store were similar to those of the defendant, or that the conditions under which they were ignited were the same as those which attended the keeping of the defendant's goods at the time of the fire in question. The only kinds of evidence competent upon the question now under consideration, were, first, evidence of the composition and character of the particular article alleged to have ignited spontaneously in the store of the defendant, and second, evidence of experts competent to speak generally of the composition and character of similar articles.

The objection to this evidence of the witness Parker, was therefore radical, and such as could not have been obviated had it been stated with ever so much particularity. Such being

the case, I regard the objection as sufficient, and the ruling upon it as erroneous.

The same remarks apply to the ruling upon the defendant's objection to the evidence of the witness Patrick Holloway. That witness was allowed to testify to the occurrence and cause of a fire in the store of Duncan & Robbins, where he was employed as a porter, in 1855. In that case the defendant's objection was more specific. He objected "to all testimony as to other fires." The objection was overruled, and the defendant excepted. The witness then went on to state the circumstances of this fire, to give his opinion that it was occasioned by spontaneous combustion, and to testify that it was also accompanied by loss of life. The effect of the evidence of both of these witnesses upon the jury, cannot be doubted. Aside from its bearings upon the question at issue, as to which it was incompetent, it was calculated to create a feeling of hostility to the business in which the defendant was engaged, and thus to work to his prejudice.

A witness, Henry Whitaker, Jr., testified that, in May, 1867, he purchased of Mr. Edge, pyrotechnist, of Jersey City, four colored signal lights, two red and two green, and the next day delivered them to Professor Doremus, a chemist of New York city. Thereupon Professor Doremus was called, and was permitted, under defendant's objection, to testify that he had analyzed the signal lights delivered to him by Mr. Whitaker, to state of what they were composed, and to testify and demonstrate by experiment, before the jury, that these compounds were liable, under certain circumstances, to spontaneous combustion. The defendant objected to this testimony, unless it was shown that the signal lights analyzed were composed of the same materials as those alleged to have been in the store of the defendant, the only proof on that subject, then, being that the latter were made by the same manufacturer, two years before. The objection was overruled, and the defendant excepted.

This objection seems to me fatal to the trial. There was no proof that any of the signal lights purchased by the defendant from Mr. Edge were either red or green, and the case fails entirely to show that they were in any respect similar, except in name, to those analyzed and experimented upon by Professor

Doremus. In the absence of such proof, the evidence of such analysis and experiments was wholly irrelevant to the issue in this case. In this instance the objection was sufficiently explicit, and fully raised the question of the relevancy of the evidence. It should have been sustained.

There was another ruling upon an objection to evidence, which it seems to me impossible to sustain. Alfred E. Baker, fire marshal of the city of New York, was called as a witness for the plaintiff, and testified that two or three months previous to the fire, he received an anonymous letter from some person unknown, relating to the defendant's business, and having sworn to the loss of the document, he was asked to state its contents. The defendant's objection to such evidence was overruled, and the witness stated, in substance, the contents of the letter, viz: that it directed the attention of the fire marshal to the establishment of the defendant, as containing a large quantity of dangerous fireworks, subjecting the neighborhood to great peril in case of an explosion. The defendant's objection to this evidence, as in one or two former instances, was general. But I am of opinion that it was sufficient. The reason of the rule requiring the grounds of an objection to be particularly stated, is that the party offering the evidence may be distinctly informed of the grounds in order that he may remove or obviate them. But in this instance, as in one formerly considered, the grounds of objection were so apparent, and it is so manifest that they could not have been removed or obviated, that I do not think that rule applies. This evidence could not have been made admissible by any means. It was hearsay; it related to a time prior to the occurrence of the fire; it only proved that, in the opinion of some unknown and nameless person, the business of the defendant was dangerous to the public. In effect it was calculated to prejudice the defendant without adding anything to the fact bearing upon the issues in the case. The objection to it should have been sustained.

For these errors in the ruling of the court, upon objection to evidence, I am clearly of opinion that the judgment at the circuit was erroneous, and that the defendant was entitled to a new trial. The judgment of the general term must there-

fore be affirmed, and, under the plaintiff's stipulation, judgment absolute must be awarded to the defendant.

Order granting new trial affirmed, and judgment absolute for defendant with costs.

FIRE DEPARTMENT OF THE CITY OF TROY v. BACON.

June, 1867.

Under the act of 1849 (*L.* 1849, p. 239, c. 178), as amended by the act of 1857 (2 *L.* 1857, p. 171, c. 548), one who acts as agent of a foreign fire insurance association, in any city or incorporated village of the State, except the city of New York, must give bond for an annual accounting to the fire department, and payment of two per cent. of premiums, &c.

In a statute repealing a general law so far as it applied to a particular locality,—*Held*, that a proviso was local.

Plaintiffs sued Jared G. Bacon and Joseph Maulin in the supreme court on a bond. The defendant Bacon was an insurance agent, doing business at the city of Troy. The plaintiff was an incorporation of the firemen of that city. On January 9, 1855, Bacon, pursuant to the requirement of the act of March 30, 1849 (*L.* 1849, c. 178), executed a bond, with the defendant Maulin as surety, conditioned to render annually to the treasurer of said fire department an account of all premiums for insurances effected by him in behalf of foreign associations, and to pay such treasurer *two per cent.* upon all such premiums. At the date of the bond, and ever since, Bacon was agent for the Liverpool and London Fire and Life Insurance Company, organized abroad and having its American agency in the city of New York.

The complaint alleged for a breach of the bond, the neglect to furnish the account and to pay the *two per cent.* for the year ending February 5, 1860.

It appeared that the Liverpool and London Fire and Life Insurance Company, during three years preceding the trial, and including the year ending at the last mentioned date, had up-

wards of three hundred thousand dollars invested upon bonds and mortgages within the State (of which one hundred thousand dollars was deposited with the comptroller), all of which, except about sixty thousand dollars, was upon property in the city of New York, and that the company paid annually, in the city of New York, taxes to the amount of from five thousand dollars to six thousand dollars.

The defense was, that by the act of April 30, 1857 (*L.* 1857, ch. 548), the mode of taxing foreign associations doing business in this State, was so changed as to exonerate the defendant from performing the condition of the bond, and the only question in the case arose upon the construction of the two acts above referred to. They are recited in the opinion.

The supreme court, in an opinion by PECKHAM, J., delivered at circuit, and affirmed by the court at general term held that the act of 1849, requiring the bond, was not affected by the act of 1857, except as to the city of New York alone, and therefore the act of 1849 embraced the case, and made defendants liable. Hence that if defendants' corporation did business out of the city of New York in any incorporated city or village, it must fulfill the obligations of the act of 1849. Defendants appealed.

W. A. Beach, for defendants, appellants;—Cited, *L.* 1814, c. 49; *L.* 1837, c. 30; *L.* 1849, c. 178; *L.* 1853, p. 915, § 23; 1 *R. S.* p. 714, § 1; *L.* 1858, p. 405; People *ex rel.* Parker Mills *v.* Com. of Taxes of N. Y., 23 *N. Y.* 242; *Smith Com.* §§ 636, 496; Act of 1857, § 1.

Oliver P. Buel, for plaintiff, respondent;—Cited, *L.* 1857, c. 548, p. 171 (4. *Edm. Stat. at. L.* 248); Matter of Webb, 24 *How. Pr.* 247, 249; *L.* 1849, c. 178, p. 239 (4 *Edm. Stat. at L.* 200); *L.* 1858, c. 255, p. 405; *L.* 1814, p. 52; *L.* 1824, p. 340; 6 *Bac. Abr.* 380, 391, 10; *Smith Com.* §§ 478, 466, 636; Waller *v.* Harris, 20 *Wend.* 555, 561; Jones *v.* Harrison, 6 *Exch.* 333; McCluskey *v.* Cromwell, 11 *N. Y.* (1 *Kern.*) 593, 602; 1 *Stat. at L.* 663; *L.* 1829, c. 336; *L.* 1837, c. 30; *L.* 1862, c. 502, 300; *L.* 1853, p. 893; *L.* 1862, p. 507, 618; *L.* 1866, p. 1848; Ins. Cos. *v.* Com. of Taxes, 17 *How. Pr.* 206, 210; 1 *R. S.* 389,

§ 5 (1 *Stat. at L.* 362), 414, § 2; 2 *Stat. at L.* 355; 4 *Stat. at L.* 222, § 15; § 251, 2; Parker Mills *v.* Com. of Taxes, 23 *N. Y.* 242; People *v.* N. E. Ins. Co., 26 *Id.* 303; Gen. Fire Ins. Co. Act, *L.* 1853, c. 466, § 23, p. 915; Western Transp. Co. *v.* Scheu, 19 *N. Y.* 408; Oswego Starch Factory *v.* Dolloway, 21 *Id.* 449, 452; 3 *E. D. Smith*, 440 and note, 453, 456; People *v.* Mayor of Brooklyn, 4 *Comst.* 420, 427.

By the Court.—J. M. Parker, J.—[After stating facts.] The law of 1849 [Act of Mar. 30, *Laws of* 1849, p. 239, c. 178], by section 1, requires every person who shall act as agent on behalf of any association not incorporated by the laws of this State, to effect insurances against losses by fire in the city and county of New York, to pay to the treasurer of the fire department of that city, for the use and benefit thereof, annually two per cent. upon the amount of all premiums received by such person during the year. Section 2 requires every such agent, before effecting any such insurances, to give to the fire department of the city, a bond conditioned to render an annual account to such treasurer of all premiums received by him for such insurances effected by him in said city, and for the payment of the two per cent. thereon. Section 3 imposes a penalty upon every person who shall effect such insurances without having executed such bond. Section 4 requires every such agent to report to the comptroller of the State and to the said treasurer, the street and number in said city of his place of business as such agent; and section 5 provides that section 1, 2 and 3 shall apply to every city and incorporated village in this State.

No question is made but that, by this act, the bond of the defendant Bacon was required to be made to the plaintiff, and the payment of the *two per cent.* therein specified, incumbent upon the defendant.

The act of 1857, so far as it affect the question at issue, is as follows:

"Section 1. Sections one, two three and four, of an act entitled 'An act further to amend the acts in relation to insurances on property in this State, made by individuals and associations unauthorized by law,' passed March thirty, eighteen hundred and forty-nine, so far as the said sections are applica-

ble to the city and county of New York, but no further, are hereby repealed, and the following ten sections are substituted therefor: *Provided*, however, that any corporation or association created by, or organized under the laws of any government other than the States of this Union, and having assets, funds or capital, not less in amount than three hundred thousand* dollars, invested in this State, shall be liable to taxation upon such assets, funds or invested capital, as the same is levied or assessed yearly by law, which tax shall be paid as follows: Such an amount thereof as would be equal to two per cent, upon its gross premiums received for insurances upon property in the city of New York, shall be paid annually, *as hereinbefore provided, to the treasurer of the fire department of the city of New York*, and the residue of said tax requisite to make up the full amount of taxation upon its capital, as hereinbefore provided, shall be paid to the mayor, aldermen and commonalty of the city of New York, as in the case of ordinary taxation; and the payments so made as aforesaid, shall exempt such corporation or association making the same, from any and all further taxation upon its premiums, capital or assets; and whenever such capital shall be reduced below said sum of three hundred thousand* dollars, or withdrawn entirely, then, and in either event, such corporation or association shall be liable to pay the tax upon its premiums, as heretofore provided in this act." Then follow the ten substituted sections above referred to, which, with some modifications and additions, re-enact the provisions of the repealed sections, so as to give them greater efficiency in the city of New York.

The act of 1849, so far as it is applicable to the cities and villages of the State, other than the city of New York, stands unrepealed, an existing, operative statute. Does the *proviso* come in as against *it*, and relieve the foreign associations having the investment of three hundred thousand dollars, from the taxation provided for by *it*, or only relieve them from the tax provided for by the *substituted* sections applicable exclusively to the city of New York?

It is manifest, I think, that the entire act of 1857, including

* Reduced to one hundred and fifty thousand dollars by *L.* 1858, c. 255.

the *proviso*, was intended to apply exclusively to the city of New York. The ten substituted sections confessedly were, and it is equally clear that the last and only remaining section is only so applicable. I am satisfied that the *proviso* also was so intended, and that it is simply a limitation of section 1 (including the ten subsections), providing that the provisions therein contained, as to taxation on premiums, shall not in a certain event apply, as without the *proviso* they would apply; and, as those provisions are restricted to the city of New York, the *proviso* must also be restricted. The whole tenor of the *proviso*, although its language is in some respects general, accords with this view of it. The amount of tax levied under it, is, in its disbursement, confined within the city of New York, taking the place of the two *per cent.* on premiums, required by the said ten subsections, to the extent of such two *per cent.*, and no part of any surplus extended to other localities, which are left subject to the act of 1849.

The counsel for both parties agree that the position of the *proviso*, for the purpose of construction, is immediately after the ten subsections. That is in accordance with the effect above given it, in making it qualify those sections. In that position its effect is necessarily restricted, as it seems to me, to those sections, and cannot extend to the act of 1849. Although these ten sections of the act of 1857 are substituted for the four sections of the act of 1849, the latter are not superseded or merged in the former, but continue in operation, with reference to the other cities and villages, precisely as before the act of 1857 was passed. Both are complete and independent acts, the act of 1849 applicable exclusively to the cities and villages of the State other than the city of New York, and that of 1857 exclusively to the city of New York.

This construction of the *proviso* does not conflict with any apparent object of the enactment, but rather harmonizes with the general policy of the law in reference to its subject—the taxation of these foreign fire insurance companies. That policy, inaugurated by the act of 1849, devotes the proceeds of the taxation of these associations to the various fire departments of the State where the associations operate. I do not think it was the intention of the *proviso* to subvert this policy. The

application of the proceeds of the tax created by it to the fire department of the city of New York, to an extent equal to two *per cent.* upon premiums there accruing, indicates not only the *local* character of the *proviso*, but an adherence to the policy above referred to.

I am of the opinion that the construction adopted by the supreme court was right, and that its judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

FISH *v.* JACOBSOHN.

December, 1864.

Affirming 5 *Bosw.* 514.

Where A., an agent, at the request of B., his principal, gave his check to C. to discharge a debt from B. to C.,—*Held*, that if C. had a good claim against B. he could enforce payment of the check against A.

The payee of a check may maintain an action thereon, in his own name, although another person may be interested in the proceeds.

William Fish sued Isaac Jacobsohn in the New York superior court, to recover on a check for three thousand dollars and twenty-five cents, drawn by defendant at New Orleans, on his bankers in New York, and delivered by him to the plaintiff, in settlement of a balance of account due from Bernard Ullman, of New York, for whom the defendant acted as agent, to Benjamin Lumley, of London, for whom the plaintiff acted as agent.

Lumley arranged with Ullman that Piccolomini should give give representations and concerts in the United States for their joint benefit. The plaintiff was sent from England as the agent of Lumley to receive all moneys accruing from such representations and concerts, to examine, vouch, and settle all accounts on behalf of Lumley, and to pay to Ullman such sums as might be coming to him under the contract between Lumley

and Ullman. The defendant was Ullman's general agent and manager in respect to such representations and concerts, and acted as such up to the time of giving the check in suit. He appears to have, in person, received and paid all money on account of the performances that took place. In February, 1859, in the city of New York, the plaintiff demanded of the defendant, as Ullman's manager (Ullman being absent from the city), a settlement of the account of all such representations and concerts as had then been given, which settlement the defendant promised should take place. No settlement, however, was at that time had. The performances went on in February and March, in New York and elsewhere in the United States, under the management of the defendant, the plaintiff receiving from time to time from the defendant several sums of money on account of the proceeds of such performances, to which Lumley was entitled. One of these performances was to take place in New Orleans on March 11, 1859, both the defendant and Ullmann himself being in the city at the time. On that day, the plaintiff demanding of Ullman a settlement as to all such concerts as had been given, he promised such settlement, and to give him the check of the defendant for the amount or balance which Lumley was entitled to receive; and the day following promised that if he did not furnish such check by noon of March 14, he would assign to plaintiff all the receipts of such representations and concerts as should be subsequently given, after deducting the amount to be paid to the manager of the theater, until the plaintiff had received such balance. On March 14, Ullman, by writing, addressed to the manager of the theater, assigned to the plaintiff all the money accruing to him (Ullman) for such remaining performances in New Orleans. On March 16 the defendant made and delivered to the plaintiff the check in suit, for the balance, amounting to two thousand five hundred and fifty-five dollars and seventy-five cents, of the share to which Lumley was entitled of the proceeds of such representations and concerts prior to March 11, 1859, and the share, amounting to four hundred and forty-four dollars and fifty cents, to which he was entitled of the proceeds of the performance on the last mentioned day. The check was payable to plaintiff or order. On receiving the check, a receipt for the

specific items composing the amount of it was given to the defendant personally.

The superior court, at general term, affirmed judgment on the referee's report in favor of plaintiff, holding that, upon settled principles of commercial paper, the draft or check given for the accommodation of Ullman having gone to plaintiff as security for Ullman's debt, defendant was liable on it (De Zeng *v.* Fyfe, 1 *Bosw.* 335; Bank of Rutland *v.* Buck, 5 *Wend.* 66); and being payable to plaintiff individually, plaintiff could recover on it. Citing Consederant *v.* Brisbane, 2 *Bosw.* 471. Reported in 5 *Bosw.* 514. Defendant appealed.

John Townshend, for defendant, appellant;—That want of consideration was a defense; cited, Rann *v.* Hughes, 7 *T. R.* 350, note; *Doctor & Student Dial*, 2, c. 24; Barrett *v.* Trussell, 4 *Taunt.* 117; Burnet *v.* Bisco, 4 *Johns.* 235; People *v.* Howell, *Id.* 296, 304; *Byles on Bills*, 91; Geer *v.* Archer, 2 *Barb.* 420. Where one gives his check for the existing debt of another, without express stipulation, the presumption is that it was received conditionally, and the burden of proving satisfaction is on the party alleging it. Noel *v.* Murray, 13 *N. Y.* (3 *Kern.*) 167; Corlies *v.* Cumming, 6 *Cow.* 181; Chaffee *v.* Thomas, 7 *Id.* 358; *Edwards on Bills*, 192; Pratt *v.* Foote, 9 *N. Y.* (5 *Seld.*) 463, 466; Everett *v.* Collins, 2 *Campb.* 515; Olcott *v.* Rathbone, 5 *Wend.* 490. Hence, *acceptance* in satisfaction must be alleged. Pinnel's case, 5 *Coke*, 117; Young *v.* Rudd, 1 *Ld. Raym.* 60; Paine *v.* Masters, 1 *Strange*, 573; Webb *v.* Weatherbee, 1 *Bing. N. C.* 502; Sibree *v.* Tripp, 15 *Law J. Exch.* 318; Crisp *v.* Griffith, 2 *C. M. & R.* 124; Senior *v.* Lloyd, 3 *Dowl. P. C.* 572; Hardman *v.* Bellhouse, 9 *Mees. & W.* 497; Drake *v.* Mitchell, 3 *East*, 256. A direct allegation is essential. McDowall *v.* Boyd, 12 *Jur.* 980; Maillard *v.* Duke of Argyle, 1 *Dowl. & L.* 536; Emblin *v.* Dartnell, *Id.* 591; Hough *v.* May, 4 *Adol. & E.* 954. *Prima facie* the agent can take only cash. Sykes *v.* Giles, 5 *Mees. & W.* 645; Bailie *v.* Moore, 10 *Jur.* 592; Ward *v.* Evans, 2 *Salk.* 442. A check for payment of a third person's debt is without consideration. Crofts *v.* Beale, 5 *Eng. L. & Eq.* 408; Nelson *v.* Searle, 4 *Mees. & W.* 795. To enable a third person to sue as trustee of an express trust, he must sue

as trustee, and not as an individual. *Voorhies' Code*, 6 ed. 139, *note d;* Gould *v.* Glass, 19 *Barb.* 179; Merritt *v.* Seaman, 6 *N. Y.* (2 *Seld.*) 168; Murray *v.* Hendrickson, 6 *Abb. Pr.* 96; Eagle *v.* Fox, 28 *Barb.* 473; Palmer *v.* Smedley, 6 *Abb. Pr.* 205; Nelson *v.* Eaton, 7 *Id.* 305. Plaintiff has alleged unnecessary matter, which shows he has no cause of action; and this is fatal. *Gould Pl.* 153, § 171; Moore *v.* Foster, 5 *Com. B.* 220; Page *v.* Boyd, 11 *How. Pr.* 416; Hatch *v.* Peet, 23 *Barb.* 575; Jones *v.* Phœnix Bank, 8 *N. Y.* (4 *Seld.*) 230; Livingston *v.* Miller, *Id.* 283, 289. The true construction of the complaint is, that plaintiff took the check for his own benefit; and the want of consideration is obvious. Moss *v.* Livingston, 4 *N. Y.* (4 *Comst.*) 208; DeWitt *v.* Walton, 9 *N. Y.* (5 *Seld.*) 571.

Thomas H. Rodman, for plaintiff, respondent;—That the action was well brought, in plaintiff's name. Erickson *v.* Compton, 6 *How. Pr.* 471; Morgan *v.* Reid, 7 *Abb. Pr.* 215, 219.

WRIGHT, J.—It is insisted that the judgment is erroneous, and for the reasons, 1, that the check was without consideration; and 2, that the action was improperly brought in the name of the plaintiff. Neither of these objections I regard as tenable.

1. The check imported a consideration, and the *onus* was on the defendant to show that, in fact there was none. This was not necessarily shown by an admission in the pleading, nor by proving, that it was given in settlement of a balance of account due from Ullman to Lumley for Lumley's share of the proceeds of the Piccolomini operatic representations and concerts. If the money or funds for which the check was given were in the defendant's hands at the time of giving it to the plaintiff, there was no want of consideration for the promise on the face of the check. It was not shown that he did not hold the funds for which the check was given, and it is inferable from the facts found that he did. The facts were these: [The learned judge here recapitulated the facts.]

The transaction, then, in substance, was this: The proceeds of the performances in which Lumley and Ullman were entitled to share, were collected and held by the defendant. The

net receipts of the concerts had come into his hands. The fact of Ullman promising, and the defendant giving, his own check and taking a receipt in his own name for the amount due, shows conclusively that the very money for which the check was given was in the defendant's hands. If it was, there was no want of consideration for the promise on the face of the check. Instead of paying over Lumley's portion of the proceeds of the concerts held by him, the defendant substitutes his check therefor, and induces the plaintiff to accept it. Holding Ullman's or Lumley's funds in his hands, and inducing the plaintiff to take his order instead of the funds themselves, the objection that there was no consideration for such order is without force. Nor can the defendant, after thus inducing the plaintiff to accept his check, question the authority of the latter to receive it. No one but the plaintiff's principal could repudiate that authority.

2. The plaintiff was the proper party to bring the action. The promise was made to him. It was a contract in writing with him personally. Before the Code, an action on the check would have been maintainable only in the name of the plaintiff. Since the Code every action must be prosecuted in the name of the real party in interest, "except that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted" (*Code of Pro.* §§ 111, 116); and it is declared that the "trustee of an express trust, within the meaning of the section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." § 113. So that whether the contract was made for the benefit of the plaintiff individually or for the benefit of Lumley, the plaintiff was equally entitled to sue.

The judgment of the superior court should be affirmed.

INGRAHAM, J.—The defendant was the agent of B. Ullman. As such agent he received the proceeds of operatic performances. The plaintiff claimed a balance due; and Ullman promised to deliver defendant's check in payment, or assign the receipts of certain concerts. He requested defendant to give the check, and plaintiff gave a receipt for the same on Ullman's ac-

count and credited Ullman with the amount. Afterward the concerts were held, and plaintiff paid to defendant the share of Ullman which he had received of the concerts, and claims that the said check was held upon a good consideration.

The defendant objects to the recovery, upon the ground that the check was given without consideration, and that that fact may be inquired into between the parties. Admitting the law to be as contended for on the part of the defendant, still there is another rule which takes this case out of the class of cases relied on by the defendant. This check was given by the defendant in payment of the claim of Lumley due from Ullman and at his request. It would be the same as a note borrowed by Ullman from the defendant for the purpose of paying Lumley's claim. In such a case it becomes accommodation paper in the hands of the party for whom it was made and to whom it was passed, and if Lumley had a good claim against Ullman he can collect the amount of this check passed to him by the defendant for the express purpote of paying this debt. This was so held in Seneca County Bank *v.* Neass, 3 *N. Y.* 442, in a case where the accommodation party put his name to the note without any restriction, and the court held it was rightly used when paid by the holder for a precedent debt, and that the consideration was sufficient. The present case is a stronger one, for the check was paid by the defendant himself in discharge of the debt due from Ullman to Lumley.

An objection is made that the action should be in the name of Lumley. The evidence shows, and the referee finds, that the plaintiff credited Lumley with the amount, and afterward, having received the check, the plaintiff paid over to Ullman's agent the proceeds of certain concerts in his hands and which were held by him as security. These facts gave Fish such an interest in the check as would enable him to maintain an action upon it in his own name, independent of the fact that the contract was with him and the check made payable to his order.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

FISK *v.* POTTER.

December, 1865.

After a railroad company had executed and recorded a mortgage of all the lands, &c., it owned, or should acquire, in trust to secure bondholders, an agent of the company sold and conveyed land to the company. *Held*, that he must be deemed to have waived any claim to a vendor's lien for the price, as against the mortgagees and those claiming under them.

Of the two liens, accruing at the same time, the legal lien of the recorded mortgage must be deemed superior to the secret equity of the vendor.*

It seems that a vendor's lien cannot be upheld as equal to the claim of the purchaser's *bona fide* assigns without notice.

The breach of a collateral agreement to pay part of the consideration for lands sold, in another commodity than money, creates no lien upon the land.

Notice of an unrecorded lien, after part payment of the purchase money, is not effectual against a purchaser, after a valid sale, who purchases under *bona fide* mortgagees who had no notice of the lien.†

John Fisk sued the Canandaigua & Niagara Falls Railroad Company, Isaac Seymour, Robert B. Potter, Joseph Fisher, and William Brown, in the supreme court, to enfore an equitable lien for the purchase money of land sold by the plaintiff to the company, defendants.

The railroad company, a corporation organized in 1851 (under the general railroad law), in order to raise money to aid in the acquisition of lands and construction of its road from Canandaigua to Suspension Bridge, on March 17, 1852, executed a mortgage to Isaac Seymour and another, as trustees, to secure an issue of bonds amounting to one million dollars. The mortgage was expressed to convey "the railroad constructed and to be constructed, together with, all and singular, . . . the real estate now owned by the said company, or which shall hereafter be owned by them."

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* Compare Hulett *v.* Whipple, 58 *Barb.* 224; and Smith *v.* Smith, 9 *Abb Pr. N. S.* 420, and cases there collected.

† Compare Frost *v.* Koon, 30 *N. Y.* 428.

The mortgage also contained a covenant to give further assurance, so as to embrace the railroad as the same might be completed.

The plaintiff was an agent of the company, employed in securing the necessary lands for its right of way; and the route lay across his land. On November 9, 1852, a little less than eight months after the first mortgage had been made and recorded by the company, and before the second mortgage mentioned in the opinion was executed, the plaintiff, who owned an undivided fifth of a parcel of land contiguous to the company's track, joined with his co-tenants in a sale and conveyance of the land to the company, and the company took possession and used it for their road. Plaintiff's co-tenants were paid for their shares. Plaintiff accepted from the company, to secure the payment of the sum of eight hundred dollars—the amount due him for his share—the promissory note of the company, "payable two months after its date, with interest, four shares [four hundred dollars] in stock of the company, and four hundred dollars in cash." Plaintiff took no other security, and the note was never paid.

The company became insolvent, and the trustees under the first mortgage brought an action to foreclose that mortgage for default in payment of the bonds issued under it. All persons who held recorded liens were made parties to that action; but the present plaintiff was not. A decree of foreclosure and sale was had; and at the sale, Mr. Potter, the present defendant, acting on behalf of himself and others, purchased the property of the company, including the parcel conveyed to them by the plaintiff and his co-tenants. Potter made a part payment at the time of the foreclosure sale. But before the principal part of the purchase money on the sale had been paid, the present plaintiff brought this action to establish his right to a lien on the parcel conveyed by him to the company, for the amount of purchase money unpaid.

The referee before whom the cause was tried held that plaintiff was entitled to such lien; and judgment in his favor was affirmed by the supreme court at general term. Defendants appealed.

Clarkson N. Potter, for defendants, appellants.

F. E. Cornwell, for plaintiff, respondent.

POTTER, J.—This case calls for the determination of one of the nicest questions of the law of natural equity. The plaintiff claims an equitable lien upon certain premises for unpaid purchase money. The defendants claim as purchasers under a foreclosure and sale of a mortgage, given to *bona fide* mortgagees. The facts and circumstances surrounding this case, as connected with the claims of both parties, are peculiar and unusual. They are an exception to, and a departure from, the ordinary dealings of parties making such claims, or defending against them. The inquiry, therefore, whether the plaintiff's lien exists, or did exist, and, if it did, whether the plaintiff did not waive it or allow a superior equity to come in to defeat it, calls for an examination into the effect and bearing of those peculiar circumstances which distinguish this case from all others, or, at least, from all ordinary cases.

It may be remarked that the rule of equity which establishes the right of lien in the vendor, for unpaid purchase money of the lands sold to the vendee, is an anomaly in the law; and, though it exists in certain cases, and, perhaps, we may say generally, as between vendor and vendee, its existence depends upon and is controlled by no well settled rules, but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case; that is, whether or not a case of natural equity is established, and, if so, whether it is not made to yield to higher or superior equities in some other person,—whether the party is not to be regarded as having waived it, or as having intended to waive or postpone it to another equity,—or whether, by the acts, or omissions to act, or by the neglect of the party claiming such lien, to enforce it within a reasonable time, the right is not lost as being the superior claim. These considerations control and vary the result as equity demands. It is true that it is sometimes an exceedingly difficult matter properly to adjust the equities between parties making this claim, and those having rights in hostility to it. This case

must be decided by applying to it equitable considerations.

The claim of the plaintiff in this action, if it ever existed as a *lien*, it must be conceded, remained a secret invisible lien or trust, undiscoverable by any search of the public records. It is not made a *constructive* lien by any positive law; and its existence could be known only to the plaintiff and his immediate vendee, except by actual notice given, which it is not claimed was given in this case. The defendants' claim, it is not denied, is that of a *bona fide* purchaser in good faith, upon a clear record evidence of title, for a valuable consideration, and without notice of the plaintiff's claim.

The defendants insist that though the plaintiff's demand was for the purchase money of the property, the sale was made under such circumstances that, by the principles of equity, an intent to waive the lien by the plaintiff, is *necessarily* to be inferred. This leads us to the examination, with some minuteness, of the attendant and surrounding circumstances, and into the nature, the object, and the intent of the several contracts and of the parties thereto, upon which the parties base their conflicting equities, and into the knowledge of the plaintiff of the object to which the property was to be devoted. This involves, also, the necessity of examining into the provisions contained in the charter of the Canandaigua & Niagara Falls Railroad Company, into the provisions of the statute under which they were incorporated, into the acts and probable motives of the parties in making their contracts, the knowledge of the parties of these provisions of the law, and what considerations the principles of equity will hold necessarily entered into the contemplation of the several parties at the time of making their several contracts.

As to all the *facts* in the case there is no conflict. No witness except the plaintiff was sworn in the case to any material fact. We may, therefore, assume as true, the facts found by the referee; and so far as other facts sworn to by the plaintiff appear, we may regard them as true for the purpose of showing his intent as to the question of retaining or of waiving his lien, upon which facts the law of equity must act. A reference to a few of these leading facts may be necessary, in order to

illustrate the view I have taken of the rights of the parties.

1. The plaintiff, before he conveyed his interest in the lands in question to the said railroad company, and previous to taking the notes in question, had been in their employ as their agent in acquiring land titles for them under their charter, and was also a stockholder in the company. The statute under which their charter was taken authorized the borrowing of money, upon a mortgage to be given upon their corporate property and franchises, for the purpose of completing, finishing and operating their road, and upon bonds to be issued, based on such mortgages. It is not, then, a forced or unreasonable presumption to hold, as against such an agent of the company as the plaintiff was, that he knew, not only the powers of this company in this respect under their charter, but also of their design and intent of mortgaging the lands he was so purchasing for them, in order to complete, finish, and put the road in operation; and this legal presumption of knowledge is the stronger, from the fact that, at the time the plaintiff conveyed his land to them, the line of the road had been, and was then, laid out over his said land, and the franchises of the corporation existed over such land, and the one million dollar mortgage by the corporation upon all the rights and franchises of the corporation, and on all the lands and real estate then owned, and all that should be thereafter owned by the said corporation, and was then, and for two months previous had been, on record in the clerk's office of that county. This mortgage recited upon its face the object for which it was given, to wit: that the bonds might be issued on which to raise money, the proceeds of which were to be applied to the completion of the said road; and it also recited the powers conferred in the statute for this purpose. To a mere stranger to their business and interests, the record of a mortgage like this, prior to his conveyance to them, would not be constructive notice of its existence, or of their object in making it; but, to the agent of this corporation engaged in acquiring titles for them, for such a purpose, it would be more than *constructive* notice,—it is presumptive evidence, of a strong character, of *actual* knowledge to him,—that *bona fide* bondholders had advanced, or

would advance, their money (it is immaterial which) upon the faith of this mortgage, and upon the faith of the public records as to the title and incumbrances.

Upon the point in this case, that an equitable lien of a vendor for unpaid purchase money is deemed to be *waived*, by acts of the vendor, from which it may be presumed that he did not intend to retain his lien, such facts as are above stated are controlling. It is inconsistent with good faith on his part that he should retain a secret lien under such circumstances, against such persons as he knew already had, or who would, advance their money on the faith of a clear record. Such acts are incompatible with an intent on his part of retaining a lien; they evince that he did not, at the time of making the conveyance, contemplate the holding of a lien. It is not honest, it is not good faith on his part, that he should retain such a lien against subsequent *bona fide* bondholders.

It is safe to assert that there is no authority to be found in the books, with one exception, that lays down the rule that such a secret lien can be set up in a court of chancery, as equal or superior to the claim of the *bona fide* assigns, without notice, of the vendee. SUGDEN, in his work on Vendors, it is said, lays down the rule in favor of the vendor's lien; but Chief Justice MARSHALL, who examined this doctrine fully, in the case of Bayley *v.* Greenleaf, 7 *Wheat.* 46, repudiates the authority of SUGDEN, and says the weight of authority is the other way. The language of Chief Justice MARSHALL, in that case, is so clearly to the point, and so ably reasoned and forcibly expressed, that I transfer it to this opinion. He says: "To the world, the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own, in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate upon which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bona fide* creditors." He further

says, in effect, that the correctness of such a doctrine cannot be admitted until it has been *expressly* decided. It had not then (in 1822) been so decided. It has never been so decided since by any court of authority, within the limits of my research. If it was not then the law, it is not now. As to what acts constitute a waiver of such lien, see Brown *v.* Gilman, 4 *Wheat.* 255; Mackreth *v.* Symmons, 15 *Ves.* 349; Hare *v.* Van Deusen, 32 *Barb.* 92; Coit *v.* Fougera, 36 *Id.* 195, 198.

If, therefore, the plaintiff is to be regarded as having knowledge that the railroad company had the power by law to mortgage said lands, and had given or intended to give the said one million dollar mortgage for the objects authorized by the statute, and that such mortgage covered the franchises, and all lands then acquired, and that should be acquired, and that such mortgage would instantaneously, upon the plaintiff's conveyance, cover the lands the plaintiff should so convey; and that such mortgage would be the basis upon which money would be advanced by innocent bondholders in good faith; if he knew the said railroad company intended to take immediate possession of the land so conveyed, and grade and put on structures with the money so to be obtained; does not the necessary legal presumption arise, that the plaintiff intended to give them the power to mortgage, and that he intended to waive, or not to claim, his equitable lien thereon? I think it does. True, the referee does not find as a fact that he did or did not so intend, but the intent from given facts is a question of law. The facts are undisputed in the case. The law resulting from undisputed facts need not be found. It is for the court to pronounce what the law is upon them.

But I am not willing to decide this case alone upon the ground I have been considering, as it was not the ground taken by the referee who decided the case. Suppose I am in error in the view I have taken, then,

2. The legal title of the land in question, upon which plaintiff's conveyance was made to the railroad company, vested in the latter. At the same instant, the lien of the mortgage which had before that been given by the railroad company, and which, before that time remained but an equitable claim upon "*rights to be acquired*," according to the case of Seymour *v.* Canandai-

gua & Niagara Falls R. R. Co., 25 *Barb.* 284, 308, became a vested *legal* right upon the premises in question. Assuming now, for the purpose of the argument, the position urged by the plaintiff, that he did not intend to waive his equitable lien for the purchase money, all that he can then claim is, that his equitable lien attached at the same instant of time with the mortgage lien. Here, then, are two liens, accruing at the same instant, the one a secret equitable one, the other a legal, written, recorded, public one. The question would then seem to be, which of these liens has the priority? As between vendor and vendee alone, there is no question; but this case does not present such a question. The learned referee assumes, in his decision, that both these liens were mere equitable ones. I think this was not so as regards the mortgage. This mortgage was executed in pursuance of an express provision of a statute of the State. It therefore became a legal mortgage, created for a legal purpose, and its lien must have been a legal lien upon all the premises it covered. *L.* 1850, c. 140, § 28; Seymour *v.* Canandaigua & Niagara Falls R. R. Co., *supra*. This presents directly the question, which of two liens, accruing at the same instant of time, has the superior equity, the one a constructive one only, arising upon a secret trust, by operation of law, or based upon the ground of its being a natural equity connected with the consideration of the property purchased, the other arising upon a specific legal lien based upon written contract, and made matter of public record?

Preliminary to the examination of this question, we may state what we understand to be settled law, generally, in regard to what is called a vendor's lien for unpaid purchase money. I do not deem it necessary for this purpose to inquire, whether it is founded upon a trust, or is to be regarded as a natural equity. It is not based upon an express contract, but, wherever it exists, it is to be implied, from the presumed intention of the parties at the time of making the contract; and, as we have said, whenever circumstances exist at the time, in the nature of the contract, or otherwise, from which it may be reasonably and necessarily inferred that the parties did not contemplate or intend to create this lien, it will be held not to exist, or to have been waived. The general rule, however, is, that, directly, as

between vendor and vendee, such a lien exists to the extent of the unpaid purchase money; and this extends to and against the heirs of the vendee, and his privies in estate, and against subsequent purchasers with notice of the lien; against purchasers who advance no new consideration; against voluntary assignees who are not, within the meaning of the rule of equity, *bona fide* purchasers; and against judgment creditors of the vendee; but it does not exist against purchasers under a conveyance of the legal estate, made *bona fide*, for a valuable consideration, without notice, if they have paid the purchase money. It would be in vain to attempt to reason against the conclusive argument of Chief Justice MARSHALL, in Bayley *v.* Greenleaf, *supra*. No court in this State has ever yet presumed to question the authority of that case; on the contrary, it is supported by cases in our books. See Garson *v.* Green, 1 *Johns. Ch.* 308. This case does not present a fair occasion to overrule Bayley *v.* Greenleaf for the first time.

However potent this latent, *unwritten* equity lien has been regarded in cases between vendor and vendee, which I am not disposed to question,—as between subsequent *bona fide* creditors, and the vendor, it cannot be held in a court of equity that it possesses a higher claim than would a *written* and unrecorded mortgage. In regard to the latter, a search of the public records protects a purchaser against it. Upon every sound principle of the law of equity, as well as public policy, *bona fide* purchasers and mortgagees who are about to invest money on the faith of title, should be held to have satisfied the demands of reasonable diligence, when they find an unincumbered record.

Upon the question of the superiority of liens, between such as are called *legal* and those which are called *equitable*, it is a maxim, coeval with the law of equity, that "where equities are equal the law must prevail." 1 *Fonbl. Eq.* c. 4, § 25 and note; *Francis' Maxims* 61; *Story Eq. Jur.* 64 *c.* In Hargrave & Butler's notes to *Coke upon Littleton*, 290 *b*, the rule is thus laid down: "If a person has the *legal* estate or interest in the subject matter in contest, he must, necessarily, prevail at *law* over him whose right is only *equitable*, and not, therefore, even noticed by the courts of law. This advantage he carries with him so far, even into a court of *equity*, that, if the equitable

claims of the parties are of equal force, equity will leave him who has the *legal* right in full possession of it, and will not do anything to reduce him to an equality to the other, who has the equitable right only."

In the case of Worrall *v.* Marlar, reported in a note to Bosvil *v.* Brander, 1 *P. Wms.* 459, 460 Lord THURLOW remarked, "that a court of equity has a much larger consideration for an assignment actually made by *contract* than for an assignment by mere operation of law." See also 9 *Ves.* 100; *Story Eq. Jur.* 1228, Bayley *v.* Greenleaf, 7 *Wheat.* 46, to the same effect.

There is another well established rule of equity "that where the defendant has an equal claim to the *protection* of the court of equity for his title, as the plaintiff has to the *assistance* of the court to assert his title, the court will not interpose on either side, for there the rule is "*in equali jure, melior est conditio possidentis.*" 4 *Inst.* 180; *Best on Evid.* 293, § 252.

The referee held that, between these parties, "neither is prior, in time, to the other." The defendant, it is conceded, is in possession. The plaintiff, with whatever knowledge the law will presume against him, from his being the company's agent in obtaining lands for their said road, actually sold them his lands for that purpose. To have acted intelligently for them, it was his duty to know their powers and their designs. He had the opportunity of knowing them. He reserved no lien in his conveyance. If he knew of the railroad company's mortgage, or of their intent to mortgage, he did not exercise ordinary caution in omitting to reserve his lien in the conveyance. He took no written mortgage. Whenever the law gives this lien to a vendor, it gives it to him only for the purpose of working out an act of justice for him. The lien does not exist in his favor, as an inflexible rule, and, if it ever did, it ceases to exist when circumstances justify such a conclusion. It would be the clearest injustice to hold its existence, under the circumstances above stated, against *bona fide* mortgagees and bondholders, who have advanced their money on the faith of a clear public record as to title and incumbrances. It would be carrying the doctrine of these secret liens to an extent never before carried in any reported case in this State. It would overturn the case of Bayley *v.* Greenleaf; it would render in-

secure all dealing in titles; and the object of, and securities intended by, our recording acts would, in effect, be destroyed.

It is not perceptible how a greater degree of diligence could be reasonably demanded of these mortgagees and bondholders, than a faithful and diligent search of the public records for a clear title and freedom from incumbrances. A diligence equal to this on the part of the plaintiff cannot be claimed. He had the power to have made his lien public. Diligence in his own behalf, and duty to subsequent dealers with the title, under such circumstances, called for this precaution of putting his claim where it could be subject to public inspection. This lack of diligence on the part of the plaintiff should, in equity alone, give preference to the defendants.

I think there is still another ground upon which to hold that the plaintiff did not intend or contemplate the holding of a lien for the purchase money. He took an agreement to receive the one half of the consideration in stock of the company, that is, to receive his pay in another commodity than money. It was an exchange of land for stock. No case has gone so far as to hold that the breach of a collateral agreement, even as between vendor and vendee, create a lien. If, at the instant of taking this collateral agreement, and to the extent of the amount mentioned in it, it was not a lien, a subsequent breach of it would not give relation back to such a lien. The decree makes this part of the consideration also a lien. This, I think, was also error.

3. The decree which the plaintiff did obtain is clearly unjust against the defendants in another sense. The *franchises* of this railroad company, with its rights and privileges and possibilities, are mingled in one with the mortgage upon the lands. This secret lien (if it exists) extended no further than to the land which the plaintiff conveyed; but the decree extends this lien, beyond the land, to the rights, franchises and possibilities to which the lien never could have extended. A sale under this decree carries with it rights not covered by the lien: it would sever and destroy the interest of *bona fide* holders, under the mortgage, of legal rights superior and prior to the claim of the plaintiff. These, as well as the public interests, under this decree, are all made to yield to the power of this secret, invisible

lien or trust. Before the plaintiff conveyed his land, this mortgage was a *legal* mortgage lien upon all the rights and franchises of this railroad company; it was a *legal* mortgage upon all the lands that had been acquired, and was a mortgage in equity upon rights to be acquired, as was held by the case of Seymour *v.* Canandaigua & Niagara Falls R. R. Co., *supra*. These *franchises* covered the plaintiff's land in one sense, because the line had been adopted which crossed his lands. His land was purchased to be appropriated as a part of this road. So, if the plaintiff's lien attached to the land for its consideration money, it did not attach to the franchises, which he did not sell, but only to the land subject to the franchises, which he did sell. Assuming his lien to exist upon the land, it would present an anomalous and most extraordinary condition of liens. It would be this: the mortgagees would hold a *legal* mortgage upon the lands previously conveyed, and upon the rights and franchises of the road absolutely, and a legal recorded mortgage upon the lands conveyed by the plaintiff subject to the plaintiff's equitable lien; and the plaintiff's equitable lien on the lands conveyed by him would be subject to the *legal* lien previously acquired by the mortgagees upon the franchises, &c. A degree to enforce such a lien is in effect a severance of the franchises of the road from the road and its substantial interests, and a destruction of the corporation.

This effect, however, if the claim is good, must be submitted to. The plaintiff must recover in this case, if at all, upon the strength of his own case; and, his claim being in equity, he is bound to prove it to be better, more just, more equitable, than the defendant's claim, whether the latter be in law or in equity. "*Actori incumbit probatio.*" Another rule applies, both in law and in equity. Where a loss must fall upon one of two innocent parties, both being free from blame, justice being thus *in equilibrio*, the party prosecuting must fail unless he prove his case to be the *better*. It is seldom the case that the scale of justice or of equity stands exactly upon an equipoise; it will generally be found that some laches, some negligence or want of caution, some want of good faith, will cause it to preponderate upon the one side or the other. It seems to me that the keeping of this secret claim by the plaintiff, while standing

by and seeing *bona fide* mortgagees going on and improving it, advancing their money on it, upon the faith of a clear record, without his giving them notice of his claim, is a claim devoid of the merit of equity against the mortgagees. It is a claim not sustained by good faith, it is unsuited to the policy of the country, to the rights of unrestricted alienation, and to the security of a people whose titles are subject to such frequent changes, and where the public records are and should be the reliance and security against incumbrances and defective titles. Although the existence of such liens is conceded to be the settled law in a class of cases, and they can be enforced in equity, I think the plaintiff has not brought himself within that class. It seems to me that he has been guilty of such laches, such want of caution, such want of good faith toward those who were expending their advances upon the property, that his lien, if he ever had one, is lost as against the defendants, and that he is estopped from setting it up or from prosecuting it against them.

4. It is insisted that the foregoing views do not apply to the case before us, inasmuch as the first mortgage upon the said railroad did not exist against the plaintiff's land until the conveyance was made by him, and that his lien was not parted with at the time of the conveyance; that it must, therefore, have existed prior to the lien by the mortgage, and that it continued after the conveyance; that the mortgage contained only an executory agreement for a lien, and that the advance was, therefore, made on the promise of a lien, and not on a present lien. All this we have considered. If the vendor's lien ever existed, as an implied lien, it is conceded that it was in force as against the railroad company as direct vendees. We have endeavored to show that it could not have been intended by the parties, vendor and vendee, that it should exist. We have shown, upon authority, that it did not exist against the *bona fide* purchasers under the mortgage. We have shown that when the written mortgage lien did take effect, it became superior to the lien by way of secret trust, which is only a trust between the parties, &c., to it. And the learned referee held, and, I think, correctly, that the first mortgagees held their lien upon the premises from the instant the plaintiff's land was

conveyed to the railroad company. The referee then assumed (not in his finding of facts, but in his opinion) that the bondholders advanced their money upon the faith of the mortgage, before the plaintiff executed his conveyance. I do not think it material to the case whether it was advanced before or after the conveyance; but the referee is not sustained in his assumption by any fact in the case. There is no evidence in the case showing at what time the bondholders advanced their money. The circumstances of the case would be evidence to the contrary of the referee's opinion. The statute contemplates, first, the making the mortgage upon the road, &c., the putting it on record before the issuing of the bonds, and as the basis upon which they are to be issued; the bonds then require to be issued, to be negotiated, &c., to obtain the means to construct the road. All this would seem to require more time than expired between recording the mortgage and the plaintiff's conveyance, but it is sufficient to say the plaintiff has failed to prove it to be as assumed.

But, subsequent to this time, and after the advance of the money by the bondholders upon the first mortgage, the railroad company, in the year 1853, executed two other mortgages upon their said road, and upon the same lands, rights, privileges and franchises as in the first mortgage—one for seven hundred and fifty thousand dollars, the other for six hundred thousand dollars. In the suit to foreclose the first mortgage, the parties in interest in these two subsequent mortgages were made parties defendants, and all the rights and interests in the said premises, and of the parties thereto, were sold by virtue of the decree so obtained upon all three of the mortgages. The defendants in this action became the purchasers. If the question could arise whether the mortgagees, or their assigns, or the bondholders under the first mortgage, were purchasers in good faith, and for a valuable consideration, I do not see how this objection can be raised against the mortgagees and purchasers in good faith under the second mortgages. No question is raised whether the latter mortgagees were such in good faith. Surely, the lien of these latter mortgagees was better than the plaintiff's secret lien. On this ground, also, I think the defendants, as purchasers in good

faith, are to be protected against the plaintiff's claim; and, if his claim does exist, equity would postpone it, and make it junior to the second and third mortgages. The defendants have the superior equity.

5. It is also urged that the defendants are not *bona fide* purchasers without notice, for that Potter, one of the defendants, before he paid the whole purchase money, had notice of the plaintiff's lien. An effectual and perfect answer to this objection is, that the sale was a legal and a valid sale. The bid was five hundred thousand dollars. Fifty thousand dollars was paid down on the sale at the time of the bid, and before any notice given. By this sale, and payment of the bid, the purchaser became entitled to all the legal and equitable rights which any one of the mortgagees had held. The recipient of the money paid on the bid was not bound to refund. The purchaser was not bound to increase his bid by the amount of the plaintiff's claim, upon such a notice, but was bound to complete his purchase by paying the remainder of his bid. Notice before the payment of the purchase money, does not apply to a purchaser after a valid sale who purchases under *bona fide* mortgagees who hold their mortgages without notice. As to Potter, the purchase being legal, he having ratified it by the payment of fifty thousand dollars, the court would have compelled him to complete it, or forfeit what he had paid. The referee was clearly in error in supposing that a notice from the plaintiff to the purchaser after the sale, after he had paid fifty thousand dollars upon his bid, and but just before he paid the remainder, had any legal effect against him, and was sufficient to charge him as not being a purchaser in good faith. His purchase was made when he bid, when he paid the installment and signed the agreement to pay the balance. Upon the whole case, I am of opinion that the judgment was erroneous, and should be reversed.

A majority of the judges concurred.

Judgment reversed and new trial ordered, costs to abide event.

FITCH *v.* GARDENIER.

September, 1866.

The client wished to compromise his action; and his attorney, to induce him to prosecute it, promised to make no charge for any of his services in the suit if he failed to collect the whole amount of the claim. *Held*, that this was not a collateral undertaking or guarantee of collection within the statute of frauds; and was not void for want of a written memorandum.

John Fitch sued John A. Gardenier, in the supreme court, to recover attorney and counsel fees due to Fitch from Gardenier, in the suit of Gardenier against Springstein, in which Fitch had been Gardenier's attorney. The plaintiff established his cause of action.

To defeat the claim, defendant proved that while the Springstein suit was on trial, the defendant therein offered to pay Gardenier one hundred and fifty dollars, and to pay his own costs, to settle the suit. Gardenier informed his attorney (the present plaintiff), of the offer, and that he thought it for his interest to accept it. To prevent his acceptance of the offer, the present plaintiff then entered into an agreement with Gardenier, to the effect that he, the, plaintiff, would make no charge whatever for what he had done, or what he should do in carrying on the said said suit, if the said Gardenier failed to recover judgment in the said suit against said Springstein, and failed to collect the whole amount of his claim against said Springstein. Gardenier assented to and entered into said agreement, and on account thereof refused to accept the said offer of settlement. It further appeared that said suit was prosecuted to judgment, but that no part of the judgment had been collected, and that the same was worthless and uncollectible.

The referee found that this agreement was original and material, in the one event largely increasing the plaintiff's costs; that it involved expense, time, trouble, risk of loss to Gardenier; and that the same was a valuable consideration binding upon both parties.

Defendant had judgment, which was affirmed by the court at general term; and plaintiff appealed.

John Fitch, plaintiff and appellant, in person.

M. I. Townsend, for defendant, respondent.

HUNT, J. [After stating the facts.]—The plaintiff claims that the agreement was, on his part, a collateral undertaking, void by the statute of frauds, and that he is still entitled to recover the amount of his claim against Gardenier.

The statute declares that "every special promise to answer for the debt, default or miscarriage of another person, shall be void unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged therewith." 2 *R. S.* p. 140, § 2, *Edm. ed.*

That the general principles of law on the subject of becoming security for the debt of another, are, as claimed by the plaintiff, that the agreement must not only be upon a valid consideration, but that it must be in writing and signed by the party to be charged, there can be no doubt. If the plaintiff in this case had guaranteed to Gardenier the collection of his judgment against Springstein, and Gardenier had brought an action against him to recover the amount of such debt, the principles invoked by the plaintiff would have been applicable. In the present case there is no such claim. The plaintiff is not called upon for payment of Mr. Springstein's debt. It is not alleged that he has entered into an agreement for its direct payment; nor is any claim for payment made upon him. There is no principle of law that prevents a creditor, upon a good consideration, from making the payment of his claim dependent upon a contingency, nor is there any statute that requires an agreement to that effect to be in writing. That was the present case. The plaintiff had an accruing claim, not due in the whole, until the close of the trial in which he was engaged. Upon a valid consideration, consisting both of prospective advantage to himself, and of hazard and expense to Gardenier, he agrees with Gardenier, while such trial is in pro-

gress, that the whole of his compensation, past and future, shall depend upon the contingency of the collection by Gardenier of his claim against Springstein. I can perceive no objection to this agreement, although not in writing; and as it is found by the referee that the Springstein debt has not been paid, and is worthless and uncollectible, it forms a defense to the plaintiff's claim for costs.

The statute now existing repeals all laws "restricting or controlling the right of a party to agree with an attorney, solicitor or counsel, for his compensation." *Code*, § 303.

The plaintiff was at liberty to agree with Gardenier that his compensation should be one-half only of the statutory fees, or that it should be double that amount, or that it should depend upon any contingency contemplated by the parties. He chose to make the agreement found by the referee, and must abide by its results.

The judgment should be affirmed, with costs.

All the judges concurred, except PORTER, J., not voting.

Judgment affirmed, with costs.

FONDA *v.* BORST.

December, 1865.

The purchaser of rural property, under a deed in which the grantor bounds the premises conveyed by a road or proposed road over land retained by him, is entitled to a right of way over such land; but to entitle him to have the road or street opened to the width indicated upon the grantor's map, it must have been accepted by the public, by formal opening or by user.*

Garret T. B. Fonda sued John B. Borst in the supreme court, to compel the opening of a street. The complaint alleged that the defendant, in the year 1835, being the owner of certain lands in a place now known as the village of Fonda,

* Compare Bridger *v.* Pierson, 45 *N. Y.* 601; reversing 1 *Lans.* 481; Cox *v.* James, 45 *N. Y.* 557; affirming 59 *Barb.* 144.

caused them to be surveyed and laid out into lots, with streets, alleys and squares, and caused a map, upon which they were delineated, to be filed in the county clerk's office. That he sold and conveyed to divers persons a number of these lots, and in the deeds referred to and bounded such lots upon the streets delineated on the map. That defendant, on April 1, 1840, conveyed lot No. 390, as laid down on the map, to one Geo. W. Hatch. And by various mesne conveyances, the title thereto became vested in the plaintiff, by deed to him in fee. That said lot was bounded on three sides by lands belonging to defendant, and on the west side by a street called Broadway; which had been for some time open; and was now open and in use as a public highway down to and within about three hundred feet of the lot No. 390, to which there was no other way of access than across lands of defendant.

The prayer of the complaint was for the opening of Broadway, as laid down on the map, to the southwest corner of lot 390.

The supreme court held that, as toward the grantees, there was a complete dedication to the extent of the full width of the street; and gave judgment for plaintiff.

E. T. Schenck, attorney for defendant, appellant.

H. B. Cushney, for plaintiff, respondent.

BY THE COURT.—BROWN, J. [After stating the facts.]—The plaintiff having succeeded to the rights of Hatch, the defendant's grantee, is plainly entitled to an easement or right of way over and upon the street called Broadway, to the public highway. This result follows from the rule that when the grantor bounds the lands which he conveys, by roads, whether existing or to be made over the lands retained by him, the purchaser takes as an incident of the grant the right to the use of such roads. This is the rule with regard to rural property. So that whether the servitude which the plaintiff claims be a rural or an urban servitude, to this extent his claim could admit of no dispute. In regard to sales and conveyances of property in cities made with reference to maps in which streets are laid down and delineated, the rights of the grantees extend much further. Under certain circumstances, to which I will

allude, they have the right not only to the way or passage but also to have the streets opened and maintained of the width described on the map. It is said in some of the cases that there is an implied grant of the streets, and in others that the map becomes part and parcel of the deed of conveyance. But the principle upon which the right rests is that of dedication to the public for the uses of the street. This principle is held to apply whether the streets have been laid out by the public authorities or by the proprietors of the lands themselves. The adjudications upon the subject are mostly to be found in the reported cases for the assessment of the damages upon the opening of the streets for public use. The courts holding that, in view of such a clear and manifest intention by the donor to dedicate the land, and as he could use it for no other purposes, the damages to which he was entitled were merely nominal. In all these cases the rule is stated without any qualification, and in quoting from them, the fact that the public authorities were proceeding themselves to have the damages assessed and the street opened, was overlooked, or little or no consequence attached to it. Before the land can be deemed fully dedicated so as to entitle the purchasers to have the street opened to the width and extent mentioned in the map, it must have been accepted by the public by formally opening, as in the assessment cases referred to, or inferentially by user. This is the doctrine of the case of Badeau *v.* Mead, 14 *Barb.* 328; as it is also that of Holdane *v.* Trustees of Cold Spring, 21 *N. Y.* 474.

Judge WRIGHT, in the opinion, says: "To complete the dedication of a highway, if there be no formal acceptance by the public authorities, the acceptance should be made out by common user as a highway of the land dedicated. If the way attempted to be dedicated is not susceptible of public use or passage and cannot become a highway, it is difficult to see how a mere use by the public can be any evidence of acceptance." The case which the learned judge had under consideration was that of a *cul de sac* and could not be used as a public thoroughfare. The case now before us resembles it in this particular. The public authorities of the village of Fonda never had signified their acceptence of the street called Broadway. They had not taken any proceedings to open it, and the public had

not used it. It had been inclosed and used for cultivation since 1837 or 1838, the time the map was made and the street delineated upon it. It was under cultivation when Hatch obtained his deed.

Up to the time of the commencement of this action, the plaintiff had never been in possession of his lot, No. 390, but he walked to it once and climbed over the fence, and went upon it just before he commenced his action. There is a very sufficient reason why the public authorities did not accept and open the street, and why the public never used it. It was, at certain times of the year, incapable of public use, being overflowed by the waters of the Mohawk river. This overflow created an insurmountable obstacle to its use as a public street. For more than twenty years after the filing of the map, this proposed street has remained in a state of nature, unworked, untraveled and unused by any human being. Neither the plaintiff, nor any of those under whom he claims, has had occasion to go upon any part of it. If he or any of the other owners upon the street desire to have it accepted by the public authorities of the village of Fonda, and opened and worked for public use, and he or they are willing to bear their share of the burden of the improvement, it is open to them to do so. But, until it is accepted, either formally or inferentially, if he has at all times the right of passage over it, it is all he can demand. If this right is interrupted or impeded he has his common law action for damages against those who obstruct him in the enjoyment of this right. He is not satisfied with that, but invokes the equitable powers of the courts to open, under its judgment, this unmade street, to the extent of one hundred feet wide, when it will benefit no one, and there is every reason to think the public and the public authorities will have nothing to do with it. The authorities cited by Mr. Justice POTTER, in his dissenting opinion in the court below: Van Bergen *v.* Van Bergen, 3 *Johns. Ch.* 282; Attorney-General *v.* Nichol, 16 *Ves.* 338; Olmsted *v.* Loomis, 6 *Barb.* 152, 160; *Story Eq. Jur.* 925; are to the effect that the court of chancery does not interfere to prevent or remove a private nuisance unless erected to the prejudice or annoyance of a right long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right

must have been previously established at law, to entitle a party to call to his aid the jurisdiction of the court. The most that the plaintiff can complain of is a private nuisance, from which he has not suffered and can hardly suffer the slightest prejudice.

The judgment of the general and special terms should be reversed, and a new trial ordered, with costs to abide the event.

All the judges, except DAVIES and WRIGHT, JJ., concurred.

WRIGHT, J., delivered a dissenting opinion, to the same effect as the decision of the court below.

Judgment reversed, and new trial ordered, costs to abide event.

FORD *v.* JAMES.

September, 1868.

A delivery of a deed to the agent of the grantee to be held while he shall consider whether he shall accept it, is not a valid delivery.

Pending a negotiation for a conveyance, the grantor's attorney induced the grantee's agent to advance a trifling sum of money, and receive the deed, on an agreement that the deed should be returned and the money refunded if the conveyance was not accepted. The grantee's agent caused the deed to be put on record secretly, and returned the money to the grantor's attorney, representing to him that he had returned the deed to the grantor. *Held*, no delivery.*

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* See People *v.* Bostwick, 32 *N. Y.* 445; Fisher *v.* Hall, 41 *Id.* 416; Fonda *v.* Sage, 48 *Id.* 173, affirming 46 *Barb.* 109; Everett *v.* Everett, 48 *N. Y.* 218; Crosby *v.* Hillyer, 24 *Wend.* 280; Brackett *v.* Barney, 28 *N. Y.* 333; Hoag *v.* Owen, 60 *Barb.* 34.

In CARNES *v.* PLATT, the deed was delivered to the attorney employed by the purchaser to examine the title. It appeared by the evidence that the attorney was authorized to receive the deed, and it was in fact handed to him, and he held it until the return of his client from an absence from the city, who then refused to accept it.

The New York superior court held that as matter of law this was not a delivery (7 *Abb. Pr. N. S.*, 42; S. C., 38 *How. Pr.*, 100).

THIS COURT reversed the decision (March, 1871) on the ground that there being evidence tending to show that the grantor intended to make an effectual delivery, and the recollection of the attorney being, by his testimony, shown to be indistinct, the question whether there had been an effectual delivery was one of fact, which should have been submitted to the jury.

Judgment reversed and new trial ordered, costs to abide event.

Ford *v.* James.

Hannah Ford brought this action, in the supreme court, against Edward D. James and Sarah, his wife, Albert S. James and Mary L., his wife, and Stephen C. Williams, to set aside a deed as a cloud on plaintiff's title.

The land formerly belonged to Letitia Graham, wife of one John Graham, and defendants claimed under a deed executed by them, which plaintiff insisted was never delivered.

On the trial a witness, Spencer, testified that he was the agent of the grantors (the Grahams) for the sale of the premises; that a deed thereof, purporting to convey the land to Albert S. James, was made out and executed, and acknowledged by the grantors, which he had in his hands; that Edward D. James had had some negotiations with witness for the purchase of the land and its conveyance to Albert S.; that Spencer, having the deed in his possession, went to see Mr. Edward D. James and told him he was very anxious he should take the property; that Graham had twenty-five dollars to pay that afternoon, &c.; that Edward D. James replied, that "he would give me twenty-five dollars, and I might leave the deed with him and call in a day or two, when, if he concluded to take the property, he would pay me the balance, and if he decided not to take it, he would return the deed;" that Spencer took the money and gave it to Graham; that some time afterward he met Mr. Edward D. James, and he said he did not think it worth his while to take the property; that he told James he would give him back the money; that he afterward paid to James the twenty five dollars, and he said he would send back the papers; that he afterward inquired of him why he had not sent them back, and James told him he had sent them to Mr. Graham. It appeared that he did not send the deed to Graham, but retained it, and caused it to be recorded. There was no claim of any delivery of the deed, other than what was made by Spencer.

Albert S. James and wife conveyed to the wife of defendant Edward D. James; but the deed was incorrectly recorded, a mistake being made in the description. She, with her husband, mortgaged the land to Stephen C. Williams.

Plaintiff claimed under a conveyance from John Graham and wife, made subsequent to the deed to Albert S. James and wife.

Ford *v.* James.

BALCOM, J., before whom the case was tried, found as a conclusion of fact, that the deed in question was never delivered to Albert S. James or to any one for his use, and, as conclusion law, that it conveyed no title.

The supreme court at general term held, upon the authority of Jackson *v.* Dunlap, 1 *Johns. Cas.* 114; Jackson *v.* Phipps, 12 *Johns.* 418; Crosby *v.* Hillyer, 24 *Wend.* 280, that there was no delivery.

Plaintiff had judgment, and defendants appealed.

I. T. Williams, for defendants, appellants.—That the deed was delivered; cited, *Coke Lit.* 36 *a*; *Touchst.* 59; Thoroughgood's case, 9 *Coke*, 137 *a*; Flagg *v.* Mann, 2 *Sumn.* 487; Worral *v.* Munn, 5 *N. Y.* (1 *Seld.*) 229. Albert S. could ratify the delivery to Edward D., his agent. Com. Bank of Buffalo *v.* Warren, 15 *N. Y.* 577; *Story on Ag.* § 258; Brisbane *v.* Adams, 3 *N. Y.* (3 *Comst.*) 131; Sweetson *v.* French, 2 *Cush.* 309; Keeler *v.* Salisbury, 33 *N. Y.* 648; Hopkins *v.* Mollineux, 4 *Wend.* 465.

John E. Burrill for plaintiff, respondent.

CLERKE, J.—1. The transaction between Edward D. James and Charles S. Spencer had none of the essential requisites of a delivery. An absolute delivery is one which is complete upon the actual transfer of the instrument from the possession of the grantor; and it may be by acts merely, by words merely, or by both combined; but in all cases, an intention that it shall be a delivery must exist. So far from this being an element in this case, at the time the deed was placed in the hands of Edward D. James, he declared that he did not then receive it as a conveyance, but that he would determine, within a day or two, whether his brother would accept it; and, if he determined within that time not to accept it, he would return the deed to Spencer, and receive back the twenty-five dollars, which he had advanced; but, if he determined to accept it within that time, he would pay the remainder of the agreed purchase money. So it is clear that there was and could have been no such acceptance as the law requires. There was no

intention, by his own avowal, then, to accept; this was to be determined subsequently. Accordingly, within the time, he resolved not to accept; he called upon Spencer and received back the twenty-five dollars.

2. The conveyance from Albert S. James to the wife of Edward, gave her no rights; the act was not genuine; it was procured by her husband to consummate the fraud, and no consideration was paid. She was evidently not a purchaser in good faith, and so the referee has found. The description, in the record of the deed, was totally different from that in the deed; so that if subsequent purchasers, before the correction of the record, could be affected by a transaction of this kind, there was no notice to them, actual or constructive. The only one of the defendants whose conduct was *bona fide*, and who suffered loss from this fraudulent transaction, was Williams But as the mortgagors had no title, only a fraudulent record, pretending to give them a title, they could convey nothing to any person, however innocent he may be.

The judgment should be affirmed, with costs.

GROVER, J.—The finding of the fact by the special term, that the deed dated May 28, 1852, from John Graham and wife, to the defendant, Albert S. James, of the land in question, was never delivered, if sustained, disposes of the case in favor of the respondent, and renders an examination of the other questions raised upon the trial unnecessary. It is obvious, that, if that deed is void for the reason that it was never delivered, all titles derived therefrom by subsequent conveyances must fall with it. The judgment of the special term having been affirmed by the general term, this finding must, by this court, be held conclusive upon the parties, unless wholly unsupported by evidence. An inquiry cannot be gone into here, as to whether the finding was against the weight of evidence.

[The learned judge here recited the testimony of Spencer as stated above, and continued as follows.] Taking the evidence of Spencer alone, and it clearly appears that he never made any delivery of the deed, conditional or otherwise. He did not deliver it to James, as and for the deed of the grantors, but merely left it with him as depositary until he should determine

whether or not he would take the land. This constitutes no legal delivery. A deed may be deposited with the grantee or handed to him for any purpose other than as the deed of the grantor, or as an effective instrument between the parties, without becoming at all operative as a deed. The evidence in conflict with Spencer's, tending to show that it was delivered as the deed of the grantors, cannot be considered by this court upon this appeal. The supreme court had the power to reverse the finding of the special term, upon the ground that it was against the weight of evidence, but this court has no such power.

The judgment appealed from must be affirmed.

A majority of the judges concurred.

Judgment affirmed, with costs.

FORMAN *v.* WHITNEY.

December, 1865.

Under a bequest to the widow, for life, of the interest on a specified sum, or so much thereof as the executors may deem necessary for her comfort, she is entitled to so much as is requisite to give security from want, and furnish reasonable physical, mental and spiritual enjoyment.

The fact that she is supported by a son, under an agreement to maintain her for life, does not excuse the executor's neglect to make regular and sufficient payments.

She is entitled to choose her own place of abode.*

Clarissa Forman sued Edwin H. Whitney and Susan and Elizabeth Ann Coapman, executors of the will of Ambrose

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* See Smith *v.* Bowen, 35 *N. Y.* 83; Tobias *v.* Cohn, 36 *Id.* 363; Bundy *v.* Bundy, 38 *Id.* 410; 47 *Barb.* 135; Vedder *v.* Saxton, 46 *Barb.* 188; Burns *v.* Clarke, 37 *Id.* 496; Gilman *v.* Reddington, 24 *N. Y.* 9; 1 *Hilt.* 492; Hull *v.* Hull, 24 *N. Y.* 647; Terpenning *v.* Skinner, 30 *Barb.* 373; Hart *v.* Hart. 22 *Barb.* 606; overruling in effect, 14 *How. Pr.* 418; McKellip *v.* McKellip, 8 *Barb.* 552; Hawley *v.* Morton, 23 *Id.* 255; Loomis *v.* Loomis, 35 *Id.* 624; Butler *v.* Tucker, 24 *Wend.* 447; Pool *v.* Pool, 1 *Hill,* 580; Merritt *v.* Seaman, 6 *N. Y.* (2 *Seld.*) 168; Ferris *v.* Purdy, 10 *Johns.* 359.

Whitney, deceased, to recover the whole interest on the sum of three thousand dollars, under a provision in the will of the testator, and to compel the regular payment to plaintiff of the whole interest thereafter to accrue on that sum.

The testator's will contained the following provision for the plaintiff: "I give and bequeath to my wife, Clarissa Forman, during her natural life, the interest of three thousand dollars, or so much of said interest as my executors may deem necessary, for her comfort." The principal, after her death, he gave to his grandchildren.

The testator gave the residue of his estate to the two daughters, who were executrices of the estate, and, with Whitney, were the defendants in this action.

More than ten years before the testator's death, one of the sons had entered into an agreement with his mother (the present plaintiff) that, in consideration of her releasing a certain claim of dower, he would provide her during her life with good and comfortable food, lodging and board, in a comfortable and proper part of the dwelling-house, and furnish her with all things suitable for her comfortable maintenance, except clothing. After testator's death the widow resided with this son, under this agreement; and the defendants claimed that they were not bound to pay over more of the interest specified in the will than was specifically needed by her; and in nearly two years and a half after testator's death, and before this action was brought, they paid her only forty-five dollars. They also relied on the fact that the daughters had requested their mother to come and live with them and be by them supported, and provided with everything necessary to her comfort.

It was proved that the estate left by the deceased was worth upwards of twenty-thousand dollars. That plaintiff had only received forty-five dollars. That she was aged, unable to work, and the whole interest was necessary for her comfort and support. That defendants had not inquired into her necessities, nor answered her applications for money, nor fixed any time of payment, nor any amount. The judge before whom the cause was tried gave judgment for the plaintiff, for the whole interest (less what had been paid), to be paid at a fixed time, yearly, but allowed no costs to either party.

Forman *v.* Whitney.

The supreme court at general term, on appeal from the judgment, in an opinion by LOTT, J., held that, as the clause in the will did not refer to the agreement for support, it should not be deemed auxiliary to it, but independent of it; and plaintiff was free to find a home elsewhere; hence, the justice was warranted in finding, in the absence of proof to the contrary, that the whole interest was necessary for her support. The invitation of the daughters was no answer to her claim in this action, because she had the right to select her own home. In affirming the judgment, they, however, reserved leave to defendants to apply thereafter on new circumstances, for a reduction of the allowance. Defendants appealed to this court.

George Rathburn, for defendants, appellants,—Insisted that the court erred in the findings of fact, as to the amount of property, the necessity of the whole interest, and defendants' neglect, and in the conclusion of law, that defendants had not acted in good faith, and that plaintiff was entitled to recover.

Allard Anthony, for plaintiff, respondent,—Cited *Taylor's Prec. of Wills*, 53, 561; Stillwell *v.* Bernard, 6 *Ves.* 520; 1 *Barb. Ch.* 411; 3 *Sandf. Ch.* 623; 6 *Paige*, 298.

BY THE COURT.—DAVIS, J.—This appeal is wholly without merit. The only error of the court below was in not awarding costs to the respondent.

The testator, leaving a property valued at more than twenty thousand dollars, made no provision for his widow, except the annual interest of three thousand dollars. This he directed to be paid to her by his executors, or so much thereof as they "should deem necessary to her comfort." She was old and unable to support herself. The judge before whom the action was tried found that she needed for her comfort the whole of the annual interest bequeathed to her. But her daughters, who were executrices of the will and residuary legatees, entitled to take whatever could be saved out of the interest provided for the old lady, had furnished to her, during a period of more than two years, the munificent sum of forty-five dollars. The judge found, also, that the trustees had made no inquiries into

her wants and necessities; that they had not answered her applications for money, and had fixed no amount, nor time of payment of any sum which in their discretion she was entitled to receive; and that the payments which made up the pittance above named had been "fitful, uncertain and insufficient."

Such an apparent abuse of the trust confided to them by the will, should demand a clear explanation and valid excuse, without which it would seem to have been dictated by a heartless avarice looking only to the future interests of the residuary legatees. The excuse put forward is found in the fact that, under an agreement between the plaintiff and her son, she was entitled to her board and lodging in his house so long as she chose to remain there; and in the assumption that nothing further could be necessary to her comfort but suitable clothing, for which the old lady testified she had never suffered—though she naively added, "I might have looked better."

This excuse was altogether too narrow. The comfort for which the testator provided was not bounded by a mere *quantum sufficit* to eat, to drink and to wear. The most advanced old age demands, while reason remains, something more than these for its continued enjoyment of life. The word embraces whatever is requisite to give security from want, and furnish reasonable physical, mental and spiritual enjoyment. It implies, says Webster, "some degree of positive animation of the spirits, or some pleasurable sensations derived from hope and agreeable prospects." Mrs. Forman was entitled to feel that sense of independence which would flow from the fact of having a sure income adequate to her few and limited wants; to feel at liberty to go and come in unrestricted freedom, and te visit her friends and relatives at her own pleasure, with no depression of spirits from the idea that she is or may be a burden to them. In short, to possess those nameless currents of enjoyment which take their rise in the assurance of money in the pocket and more to come.

Instead of this, she has had under her husband's will forty-five dollars, and a lawsuit! the latter carried through all the courts to this ultimate tribunal, while, in the mean time, she has been rapidly verging on the venerable age of eighty years.

One might almost doubt the filial affection of such trustees, if their good faith were not solemnly averred in the pleadings.

I am of opinion that the judgment should be affirmed, with costs of this appeal, and with ten per cent. damages for the delay, to be computed on all moneys now due under the decree.

All the judges concurred.

Judgment affirmed, with costs, and ten per cent. damages.

FOSTER *v.* VAN WYCK.

September, 1867.

Tax assessors, having jurisdiction of the person and of the subject matter—that is, taxation of property—and invested by the statute with authority to decide what property is taxable and what exempt, act judicially in so deciding; and an assessment, though clearly erroneous in overruling a claim of exemption, is not void.

It makes no difference whether the claim of exemption arises from State or national law.

The determination of the assessors to impose a tax is a judicial determination; and an error therein, although it may be corrected by an appropriate proceeding, does not lay the foundation for an action at law by the person assessed to redress the alleged injury,*

Three tax-payers of the city of Poughkeepsie had controversy with the city corporation, the tax assessors and the tax collector, in reference to the liability of the former to certain taxes; and they respectively agreed upon a statement of facts, in each case, which were submitted to the supreme court for

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* Compare Chapman *v.* City of Brooklyn, 40 *N. Y.* 372; Bank of Commonwealth *v.* Mayor, 43 *Id.* 184; Newman *v.* Supervisors of Livingston, 45 *Id.* 576; Bailey *v.* Buel, 59 *Barb.* 158; Dorn *v.* Backer, 61 *Id.* 597; Wade *v.* Matheson, 4 *Lans.* 158; People *ex rel.* American Linen Thread Co. *v.* Howland, 61 *Barb.* 273; Buffalo & State Line R. R. Co. *v.* Supervisors, 48 *N. Y.* 93; People *ex. rel.* Westbrook *v.* Trustees, &c., *Id.* 390, Western R. R. *v.* Nolan, *Id.* 513.

determination, without action, under section 372 of the Code of Procedure.

One claim was by Charles W. Swift against the city. Another by George Van Kleeck against Frederick Woodruff, the city collector of taxes; and the third was by Daniel C. Foster, against Cornelius Van Wyck and others, the assessors of taxes of the same city.

The facts, which, with the exception of the foregoing statement of the relation which the respective defendants sustained to the transactions, were substantially the same in all the cases, are stated in the opinion of the court. The plaintiffs appealed to this court from judgments in favor of the defendants, which had been rendered in each case in the supreme court.

John Thompson and *Joseph H. Jackson*, for the plaintiffs, appellants.—The tax was illegal. Churchill *v.* City of Utica, 33 *N. Y.* 161; reversed in Van Allen *v.* Assessors, 3 *Wall.* 573. The assessment was therefore void. Davis *v.* Newkirk, 5 *Den.* 92; Prosser *v.* Secor, 5 *Barb.* 607; 15 *Pick.* 44; 1 *R. S.* 389, § 8; Adams *v.* Litchfield, 10 *Conn.* 127; and see Alexander *v.* Hoyt, 7 *Wend.* 89, 93; Suydam *v.* Keys, 13 *Johns.* 444; 5 *Barb.* 608; Mygatt *v.* Washburn, 15 *N. Y.* 316.

James Emott, for the defendants, respondents.—Action does not lie against the city for money received. Nor for the misfeasance of the assessors. 21 *Barb.* 267; 3 *Den.* 117; 1 *Hill*, 545; 12 *Barb.* 161; 11 *N. Y.* (1 *Kern.*) 392; 31 *Barb.* 505. Plaintiff, if wronged by the collector, has two sufficient legal remedies: 1. Trespass against him; and 2. A *certiorari*. Therefore, the court will not issue an injunction now. Heywood *v.* City of Buffalo, 14 *N. Y.* 534.

He is not liable in trespass. Savacool *v.* Boughton, 5 *Wend.* 170; Chegaray *v.* Jenkins, 5 *N. Y.* (1 *Seld.*) 376. The face of the warrant does not show a want of jurisdiction. The assessors had jurisdiction. 1 *Seld.* 376; Randall *v.* Smith, 1 *Den.* 214. The claim of exemption could not be raised against the warrant. Patchin *v.* Ritter, 27 *Barb.* 34; Hill *v.* Sellick, 21 *Id.* 207; Johnson *v.* Dean, 30 *Id.* 616; Ontario Bank *v.* Bunnell, 10 *Wend.* 186, 196. The assessors' action is judicial. They had jurisdiction of person and subject, and they are not liable personally, unless corruption is shown. Weaver *v.* Diefendorf,

3 *Den.* 117; Hill *v.* Sellick, 21 *Barb.* 207; Chegaray *v.* Jenkins, 5 *N. Y.* (1 *Seld.*) 375. At most their determination was erroneous, not void.

John Thompson, in reply, in addition to the foregoing authorities;—Cited and commented on Dow *v.* Parish of Sudbury, 5 *Metc.* 73; Inglee *v.* Bosworth, 5 *Pick.* 501; Baker *v.* Allen, 21 *Id.* 383; Boston Glass Co. *v.* Boston, 4 *Metc.* 181; Sumner *v.* Dorchester, 4 *Pick.* 364; 21 *Pick.* 64; Preston *v.* City of Boston, 12 *Pick.* 7; 30 *Maine*, 404; Amesbury Manufacturing Co. *v.* Town of Amesbury, 17 *Mass.* 460; Salem Iron Co. *v.* Danvers, 10 *Mass.* 514; Atwater *v.* Woodbridge, 6 *Conn.* 223; 7 *Id.* 333; 11 *Id.* 257; 13 *Id.* 228; Adams *v.* Littlefield, 10 *Id.* 127.

J. M. PARKER, J.—These are controversies submitted to the supreme court, without action, pursuant to section 372 of the Code.

The facts stated to the court in the several submissions, which are subtantially alike, show that the plaintiffs are residents of the city of Poughkeepsie, and respectively owners of shares in three national banks, organized under the act of Congress, approved June 3, 1864, and located in said city.

The assessors of that city, in the year 1865, assessed the plaintiffs, respectively, for their shares in the said banks, at their par value. The plaintiffs did not personally appear before the assessors, nor serve any claim or notice on them in reference to said assessment. The assessors made out an assessment roll in the form prescribed by statute, on which each of the plaintiffs were assessed and taxed for other property; and at the close of the alphabetical list, and on a separate part of the roll, they inserted the names of the said national banks, and the value of the real estate of each, and then, under the name of each bank so entered, they entered the names of the shareholders therein respectively, the numbers of the shares owned by each, and the par value thereof; and the common council imposed and extended the tax upon the real estate of each bank, and upon each shareholder for the value of his shares so entered.

The cashiers of the banks, before the completion of the roll, notified the assessors that such last-mentioned assessments were illegal, and demanded that they should be stricken from the roll. This was refused by the direction of the common council; a warrant was issued to the collector, under the seal of the city and the hand of the mayor, attached to the assessment roll, and with it delivered to the collector, commanding him to receive, levy, and collect from the several persons therein named the several taxes therein imposed.

Under this warrant, the collector, on June 7, 1866, levied and collected the several taxes imposed on such bank shares of the plaintiffs respectively, for their goods and chattels, and did forthwith pay the same to the chamberlain of said city, who is *ex officio* treasurer thereof.

On the part of the plaintiffs it is claimed that the said assessments, and all proceedings based thereon, were without jurisdiction and void; and that the levy on their goods and chattels, in pursuance of said warrant, and by direction of said city, was a trespass, for which the defendants respectively are liable to the plaintiffs, in the amount so collected from them.

On the other hand, the defendants claim that the assessors had jurisdiction in the premises, and admitted that the bank shares were exempt from taxation; that the defendants, respectively, are not liable to any action by reason of said assessments, &c., but that the plaintiffs, having omitted to institute legal proceedings to compel the collection of said assessment roll, by the court or otherwise, are remediless in the premises.

The supreme court held that the plaintiffs were neither of them entitled to recover, and gave judgment for the defendants respectively to that effect, and for costs.

From the judgment thus given the plaintiffs severally appeal to this court.

The question in each case is, did the assessors have *jurisdiction* in respect to the assessments complained of? for it is not denied, on the one hand, that, under the decision of the supreme court of the United States, in Van Allen *v.* Assessors, 3 *Wall.* 573, the assessment was unauthorized, and would have been set aside upon due application to the supreme court, as not being in accordance with law; nor, on the other, that if

the assessors had jurisdiction in the matter, and have erred only in its exercise, the only remedy of the plaintiffs was such application to set it aside; and that no action for the irregularity would lie against any of the defendants; except that in the case of Swift *v.* City of Poughkeepsie, it is claimed by the plaintiff that, even if the assessors had jurisdiction, so that they and the collector are not liable, still as the plaintiff was not legally liable to taxation on his bank shares, the city, which has received the money collected from him to satisfy such illegal tax, is legally liable to refund it to him.

That the assessors had jurisdiction in the matter cannot, I think, be successfully disputed.

Taxation of all property is the general rule of the statute. It provides as follows: "All lands, and all personal estate within this State, whether owned by individuals or corporations, shall be liable to taxation, subject to the exemptions hereinafter specified." 1 *R. S.* 387, § 1, 1 ed. By the same statute (p. 390, § 8), it is made the duty of the assessors "to ascertain, by diligent inquiry, the names of all the taxable inhabitants in their towns or wards, and also all the taxable property, real or personal, within the same." It is not denied that the assessors had jurisdiction of the plaintiffs, as taxable inhabitants of their towns or wards. As to the property in question, it falls within the description of property declared by section 1 of the act above quoted to be liable to taxation. It is "personal estate," as the same is defined by section 3 of the act, the term including "public stocks," and "stocks in moneyed corporations." It may also fall within one of the exemptions; but being property *prima facie* liable to taxation, and the duty of the assessors being to ascertain all the taxable property, real and personal, within their town or ward, this property, held by residents of their town, presents itself to them for their decision whether it is taxable or exempt from taxation. That it shall turn out to be exempt from taxation does not exempt it from the scrutiny required of them by the statute, to ascertain whether or not it is taxable. Being personal property within their town or ward, it is within their jurisdiction as assessors; they have the right, and it is their duty, to examine the question whether it is liable to taxation, and this a judicial inquiry

(11 *N. Y.* [1 *Kern.*] 593; 3 *Den.* 117)—one, it may be remarked, in which the highest courts have differed; and should they make a mistake, and hold it liable to taxation when it is not, surely they should not, for such mistake, be held liable as wrong-doers. Chegaray *v.* Jenkins, 5 *N. Y.* (1 *Seld.*) 376; Barhyte *v.* Shepherd, 35 *N. Y.* 238; Vail *v.* Owen, 19 *Barb.* 22; Rochester White Lead Co. *v.* City of Rochester, 3 *N. Y.* (3 *Comst.*) 463.

One of the classes of property expressly exempted by section 4 of the act from taxation is, "Every building erected for the use of a college, incorporated academy, or other seminary of learning." In Chegaray *v.* Jenkins (*supra*), the building occupied by the plaintiff as a young ladies' boarding and day school, was taxed, she claiming that it was exempt; and the collector levied on her property to collect the tax. Judge RUGGLES, in his opinion, discussing the question of jurisdiction, says: "The assessors, in determining whether the plaintiff's property was taxable as a dwelling, or exempt as a seminary of learning, acted judicially, and within the sphere of their duty. . . . . Having the general authority to make assessments for taxation within the ward in which the plaintiff's property was situated, they had jurisdiction of the subject matter of the assessment in question." See also Henderson *v*, Brown, 1 *Cai.* 92. Section 4 of the act in effect allows ministers of the gospel to hold property to the amount of fifteen hundred dollars exempt from taxation. In Barhyte *v.* Shepherd, 35 *N. Y.* 238, the plaintiff, a minister of the gospel, sued the assessors for refusing to exempt him from taxation, although his real and personal estate were worth less than fifteen hundred dollars; and it was held that the assessors had jurisdiction to decide whether the plaintiff's property was exempt or not; and in so deciding acted judicially, and were not liable for assessing the plaintiff upon his property, even though it was exempt from taxation.

It cannot be said that the bank shares in these cases were any more absolutely exempt from taxation than "a building erected for the use of a seminary of learning," or the farm of a minister of the gospel, occupied by him, and of a value not exceeding fifteen hundred dollars. If the building on the farm turns out to be exempt, because found to be in the category of

exemptions, it is as absolutely non-taxable as the bank shares in question; and yet the assessors are not liable for improperly including it in the assessment, because they are invested by the statute with the authority to decide what property is taxable, and in so deciding act judicially.

It can make no difference, I apprehend, in regard to the assessors' jurisdiction, whether this immunity from taxation arises from State law or national law. In either case, the question of liability to taxation is to be determined by the assessors, and they have, of course, jurisdiction to decide it.

It is equally a judicial decision in either case, having equal protection from liability for having decided erroneously.

It is impossible to make any distinction, in respect to the subject under consideration between the case at bar and the cases last cited; and, as was said by Judge LEONARD in Barhyte *v.* Shepherd, after remarking upon the holding in Mygatt *v.* Washburn, 15 *N. Y.* 316, that assessors have no jurisdiction to assess a non-resident for personal property: "It is not necessary to extend the application of the rule on any ground of public policy, that I can perceive, so as to include cases of mistake in deciding a claim to exemption, where the person and estate of the party are within the jurisdiction of the assessor."

The circumstance that the assessment of the bank shares was separate from the other personal property of the plaintiffs, and specifically upon the shares, does not affect the question of jurisdiction. If the assessors, having jurisdiction of the subject-matter, and of the persons of the plaintiffs, have failed to follow the directions of the statute in making up their roll, their action was irregular, and open to correction upon proper application to the supreme court; voidable, but not void. Easton *v.* Calender, 11 *Wend.* 91, 95; Cunningham *v.* Bucklin, 8 *Cow.* 178; Wilson *v.* Mayor, &c. of N. Y., 1 *Den.* 595, 599; Butler *v.* Potter, 17 *Johns.* 145; and cases above cited. The rule is stated in Easton *v.* Calendar as follows: "Where the magistrate or officer has jurisdiction of the subject-matter, and errs only in the exercise of it, his acts are not void, but voidable, and the only remedy is by *certiorari* or writ of error."

In regard to the liability of the city of Poughkeepsie to refund the taxes paid into its treasury, and under the assess-

ments in questions, I am unable to see how it can be. The assessment was not void, but irregular or erroneous; and the only mode of avoiding such an assessment is by an application to the assessors, or by a proceeding in the supreme court to correct the errors or irregularities. While the assessment stands unreversed, it is as effectual to protect, not only those by whom it was made and executed, but all persons claiming under it, as a judgment of a court having jurisdiction. It would be an error to hold that no liability attached to those who instituted and carried out the proceedings to compel the payment of the money by the plaintiffs (there being no statutory protection), and yet that the individual or corporation who received it is legally liable to refund it.

The cases cited by the learned counsel for the appellants, holding, "that when a tax has been *illegally* assessed and collected, the money may be recovered back," are cases where there was, in the view of the court, a want of jurisdiction. In Gsborn *v.* Danvers, 6 *Pick.* 89, it was held that when a taxable inhabitant is overrated by assessors, whether by including in the valuation property of which he is not the owner, or that *for which he is not liable to be taxed*, that does not render the assessment invalid or void; and his only remedy is by application to the assessors, or the court of sessions, which is authorized to relieve in such cases, and not by an action for money had received.

I am of the opinion that the judgment appealed from should be affirmed.

As to the case of Foster *v.* Van Wyck, and Van Kleeck *v.* Woodruff, all the judges concur in affirming the judgments.

As to the case of Swift *v.* City of Poughkeepsie, a sufficient number of judges to give a judgment failing to concur, a reargument in that case is ordered.*

Judgment affirmed in the first and second cases, and reargument ordered in the third case.

* That case was finally determined in favor of the defendants also. 37 *N. Y.* 511.

FREEBORN *v.* WAGNER.

December, 1868.

Affirming 49 *Barb.* 43.

A testator devised all his estate, real and personal, to his wife and daughter, in equal shares, and giving each a power of testamentary disposition, unaffected by any trust or limitation; but imposed the restriction that, in case either died intestate and without issue, whatever might remain of the property was devised to the survivor.

Held, That a joint conveyance by the devisees of land so devised, with a covenant of warranty, passed all the title of the grantors, either vested or contingent; that such title was good, and the purchaser was bound to accept it; and no execution of the power of testamentary disposition, made after the conveyance, could have effect on the estate conveyed.

Eliza C. L. Freeborn (formerly Eliza C. Outwater) and Sarah A. Vedder (formerly Sarah Augusta Outwater) brought this action, in the supreme court, against John W. Wagner, to compel specific performance of defendant's agreement to purchase from the plaintiffs land and buildings in Tivoli, N. Y.

The parties, by stipulation, admitted the making of a contract, by the plaintiffs, as devisees of James Outwater, deceased, by which the plaintiffs had agreed to give defendant "a proper deed of conveyance, duly acknowledged, for the conveying and assuring to him the fee simple of said premises, free from all incumbrances," on receiving a certain payment; and he agreed to purchase accordingly, and to give a purchase money mortgage for the residue of the price. They also admitted that Outwater, the plaintiffs' devisor, died seized of the premises in fee, free of all incumbrance.

The only question raised, was whether the devise to the plaintiffs enabled them to convey the fee.

The language of the will was as follows:

"*First.* I give, devise and bequeath all my real and personal property and estate, of every nature and kind, to my dearly beloved wife, Eliza C. Outwater, and to my beloved daughter, Sarah Augusta Outwater, each the equal one-half part thereof;

share and share alike; subject only to the restrictions and provisions in the second item of this, my will, stated and contained." [Here followed a declaration that this provision for the wife was to be in lieu of dower.]

"*Second.* My wife, at any time after my decease, may make such testamentary disposition of my property and estate hereinbefore given to her as shall seem to her to be just and proper; but in case of her death, intestate and without issue, then she shall be deemed to have held the same in trust, for and during her life only, and not absolutely or in fee; in which case, I give, devise and bequeath, whatever may remain of the same property and estate, to my daughter, Sarah Augusta; and in case of the death of my said daughter without issue and intestate, she shall be deemed to have held the property and estate hereinbefore given to her in trust, for and during her life only, and not in fee or absolutely; in which case, I give, devise and bequeath whatever may then remain of the same property and estate to my wife."

The third and last clause appointed the devisees executrices.

The will was made in 1860, and the testator died in August, 1862. The plaintiffs joined in a warrantee deed, which they duly tendered to defendant, and he refused to receive.

The supreme court, at general term (on appeal from a judgment in plaintiffs' favor, given at special term), held, in an opinion by GILBERT, J., that, as both devisees had united in a conveyance with warranty, this would divest all their estate vested or contingent, and the warranty would estop them from asserting any title in contravention of the estate. That the will manifested an intent to give an absolute power of disposition to each devisee in her lifetime; because the limitation over embraced only such part of the property as should remain undisposed of at the death of the devisee first dying. Under 1 *R. S.* 732, §§ 83, 84, this power of disposition was equivalent to actual ownership. 4 *Kent's Com.* 319; Jackson *v.* Edwards, 7 *Paige,* 401. And that, even if the estate of each plaintiff were regarded as a base or determinable fee, still the whole of the testator's interest was vested in the devisees, and would pass to the defendant by their conveyance. 1 *R. S.* 727, §§ 2,

7, 8, 9, 13, 35; Lawrence *v.* Bayard, 7 *Paige*, 76. Hence the estate could not be defeated by an execution of the power of testamentary disposition.

Defendant appealed.

John Gaul, Jr., and *Samuel Hand*, for defendant, appellant,—Insisted that the manifest intent of testator was to give, not an absolute power of disposition during life, but only an ample and untrammeled use. That the second clause was not void for repugnance to the first. Citing Norris *v.* Beyea, 13 *N. Y.* (3 *Kern.*) 771; Sweet *v.* Chase, 2 *N. Y.* (2 *Comst.*) 73; Guernsey *v.* Guernsey, 36 *N. Y.* 267; *Jarm. on Wills*, 416; 4 *Kent*, 268; 6 *Cruise Dig.* tit. 38, c. 17, § 2; *Bac. Abr.* tit. Devise, 1; 1 *Fearne Cont.* R. 399; Trustees of Auburn Sem. *v.* Kellogg, 16 *N. Y.* 83; and distinguishing Helmer *v.* Shoemaker, 22 *Wend.* 137. That the interest of each in the share of the other was a naked possibility, which could not be conveyed except by way release. *Shep. Touch.* 322; Jackson *v.* Waldron, 13 *Wend.* 248; Edwards *v.* Varick, 5 *Den.* 664; Pelletreau *v.* Jackson, 11 *Wend.* 110; Varick *v.* Edwards, 1 *Hoffm. Ch.* 382; 11 *Paige*, 289; and distinguishing Miller *v.* Emans, 19 *N. Y.* 384. That the statute as to powers did not apply. McDonough *v.* Laughlin, 20 *Barb.* 238; Jackson *v.* Edwards, 22 *Wend.* 509; Seymour *v.* De Lancey, 1 *Hopk.* 436; Morris *v.* Mowatt, 2 *Paige*, 586; Waldron *v.* Gianini, 6 *Hill*, 605. That an exercise of the power to devise would therefore defeat the conveyance. 2 *Story's Eq.* § 1393.

J. W. Elseffer, for plaintiffs, respondents,—Relied on Helmer *v.* Shoemaker, 22 *Wend.* 137; 1 *R. S.* 748, §§ 1, 2; Waldron *v.* Gianini, 6 *Hill*, 601; Nicoll *v.* N. Y. & Erie R. R. Co., 12 *N. Y.* (2 *Kern.*) 133; 7 *Paige*, 76, 399; 31 *Barb.* 562; 1 *R. S.* 725, § 35, 733, §§ 77–84; Guernsey *v.* Guernsey, 36 *N. Y.* 267; 1 *Edw. Ch.* 178; Talmadge *v.* Jill, 21 *Barb.* 34; *Lalor's Real P.* 208.

MASON, J.—The rule in equity requires the vendor, when he seeks a specific performance against the purchaser, to be able to make a clear title, for courts of equity will not compel a purchaser to take a doubtful title.

If, therefore, the plaintiff's title, which they offered the defendant, is doubtful, the judgment of the supreme court ought not to have compelled the defendant to take it, and the judgment must be reversed. This question of title depends upon the construction to be put upon this devise to the plaintiffs, in the will of James Outwater, above stated.

[The learned judge, after intimating that on the authority of Helmer *v.* Shoemaker, 22 *Wend.* 137, the first clause might perhaps be construed as vesting an absolute fee, continued as follows.]

This construction is expressed with great doubt, and I need not regard it as very important whether this view be sustained or not, for, during the lifetime of both these devisees, each of them holds the fee of one-half of this real estate, with the expectancy of a future estate in fee, in the other's half. These limitations of the expectant estates being limited to the two devisees, and the survivorship necessarily giving to the one or other the whole estate, and as expectant estates are transferable under our statutes the same as any other estate, it follows that the deed of the two devisees must convey all their right, title and interest, present and expectant; and consequently, a good title was offered to the defentant, in the full covenant deed of the plaintiffs. This must be so, if these devisees simply took a life estate with a general and beneficial power to devise the inheritance; for in such a case the tenant for life possesses an absolute power of disposition under our statute. 1 *R. S.* 733, §§ 81, 82, 83, 84. And, as regards a purchaser, his estate shall be deemed turned into a fee, and his conveyance, to pass a good title to the purchaser. 1 *R. S.* 725, § 35; 723, §§ 9, 10, 12; Nicoll *v.* N. Y. & Erie R. R. Co. 12 *N. Y.* (2 *Kern.*) 121, 133; Lawrence *v.* Bayard, 7 *Paige*, 70, 76; Leslie *v.* Marshall, 31 *Barb.* 560, 564.

The judgment must be affirmed.

WOODRUFF, J.—Expressed his views as follows: I cannot yield my assent to the argument that (apart from the legal effect of the power of testamentary disposition), each devisee was invested with the power to dispose of the entire fee in her lifetime, in her share devised for her benefit. That view of the

subject is sought to be inferred from the will "because the limitation over embraced only such part of the property as shall remain undisposed of at the death of the devisee who shall first die." This is a partial and disjointed presentation of the terms of the will, and is made the ground of inference that a power to dispose of the estate in the lifetime of the devisee was intended by the testator. That is to say, a gift or limitation over of "whatever may then remain of the same property and estate" implies that the first taker may dispose of a part, or even the whole of it.

This lays entirely out of view the preceding language, which in my judgment entirely forbids such implication. First, the testator gives all his estate to his wife and daughter, each the one-half thereof, share and share alike. If he had stopped here, our statute, which renders the use of the habendum to heirs, etc., unnecessary to the creation of a fee by devise, would operate, and the devisees would have taken real estate in fee simple. But that statute does not operate where the intent to pass a less estate or interest appears by express terms, or is necessarily implied in the terms of the grant. 1 *R. S.* 748. Having used words which at the common law are apt to create a life estate only, but which under the statute might create a fee, the testator proceeds to limit or restrain the operation of these terms, by declaring the devisee to be "subject only to the restrictions and provisions in the second item" of his "will stated and contained."

That item declares that his wife may make such testamentary disposition of the property so given to her as shall seem to be just and proper; but, in case of her death, intestate and without issue, "then she shall be deemed to have held the same *in trust* for and during her life only, and not absolutely or in fee."

No words could more distinctly satisfy the statute, or show more clearly that in the event of her dying intestate without issue, the interest devised by the first clause of the will should be only a life estate.

Doubtless, the term "*in trust*" has no legal significance There was no trust except for herself, and the conveyance to

A. in trust for himself for life, would certainly give him no greater interest than a life estate.

This express language is even more pointed and precise as to the share of his daughter: In case of her death intestate and without issue, "she shall be deemed to have held *the property and estate* hereinbefore given to her in trust, for and during *her life* only, and *not in fee* absolutely."

This very clear and distinct language is not noticed in the opinion below. It relates to the whole estate and property given by the first clause in the will, and in the event contemplated, declares that it shall be deemed a life estate only..

Now it matters not, that the question whether the will devised a fee or only a life estate could not be determined during the life of the first taker—the condition is just as definite and precise as if any other condition or contingency had been mentioned; *e. g.*, suppose the second item had read, "If A. B. shall return from Rome during the life of my said daughter, then she shall be deemed to have held the property and estate given to her herein, for and during her life only, and not in fee or absolutely." A clear intent, that, in the event contemplated, the daughter should take a life estate only, is thus in terms expressed, and, the testator adds, "in which case I give, devise and bequeath whatever may then remain of the same property and estate, to my wife." This is supposed to imply power of disposition in the life tenant.

1. Such an implication nullifies the declared intent that she shall take "for and during her life only, and not in fee or absolutely"—and it is made the very ground for holding that she did take a fee.

2. This clause is paraphrase of the term "remainder to my wife," a legal phrase entirely understood, and importing that the whole fee, after the expiration of the particular estate, is to go over.

It is not "whatever may remain undisposed of by my said daughter," or equivalent words, which might involve some probability that the testator supposed he had given her such an interest or power that she might dispose of some part of the property—but it is whatever may remain of the same property and estate—*i. e.*, the remainder therein not above disposed of.

3. The possible inference from that language is not sufficient to overcome the distinct and positive declaration, that she shall be deemed to have held the property for and during her life only.

I feel, therefore, constrained to reject the construction which would infer, from the terms of the will above referred to (irrespective of the power of testamentary disposition), the creation of a life estate with an absolute power of disposition by the life tenant, in his lifetime, which, even before the statute, was deemed equivalent to a fee, and which would, of course, make the title of a purchaser absolute.

Such a construction would enable either of the life tenants to convey her own share absolutely, and as effectually without as with, the consent of the other or the contingent remainderman, and is, I think, at war with the plainly expressed intention of the testator.

But it does not necessarily follow from these views, that the plaintiffs cannot convey, and did not tender to the defendant a good title, or at all events a title which neither the plaintiffs, nor their heirs-at-law, nor the heirs-at-law of the testator could afterward impeach.

This, in my judgment, depends upon other considerations than those above adverted to.

1. It should be remembered that the deed of the plaintiffs, which was offered, containing full covenants and warranty of title, will not only invest the defendant with all the estate and interest which is vested in the plaintiffs, or which they can convey, but by estoppel will bar the plaintiffs, and all who shall claim through them as heirs-at-law, from asserting any title to the premises.

2. If the devisee of either half of the premises shall die leaving issue, then the second item of the will has no operation as a qualification of the first clause, and of course the devisee will be deemed to have taken a fee, and her conveyance in fee will have full operation. The devise would not operate as an estate for life in the first taker, with a limitation over to such issue, as purchasers, by force of the devise. But rather the event upon which the estate was to be deemed a life estate

only, not happening, the first clause of the will would be left to operate as a devise in fee.

3. If the first taker dies without issue, then the estate would go over to the other devisee (unless the provision in regard to the power of testamentary disposition, prevents). Under our Revised Statutes (1 *R. S.* 722, art. 1, title 2, ch. 1) such other devisee takes under the will, not a mere possibility, but an expectant future estate, depending on the contingency of the death of the other without issue, intestate.

The term, "without issue," in the will, does not mean an indefinite failure of issue, but on well settled principles, as well as by our statute, a failure of issue living at the death of the first taker. The event upon which the remainder would vest in possession is uncertain, it may never happen—but if it should happen at any moment, the other devisee would take *eo instanti*, and the remainder would vest in possession.

Such a remainder passes by her deed (1 *R. S.* 725, § 35), and in this view, therefore, by uniting with the first taker in the deed tendered, she and her heirs are forever concluded.

4. What is the effect of the power of testamentary disposition contained in the will? and does the conveyance by the deed tendered, prevent its exercise, or defeat any disposition made by the donee of the power?

If the existence of the power operates by force of our statute to make the estate of the devisee herself, a fee, as is argued, then, of course, her conveyance invests the grantee with a fee, and no subsequent act of the grantor can defeat it.

By section 84 of 1 *R. S.* title "Of Powers" (p. 733), where a general and beneficial power to devise the inheritance shall be given to a tenant for life . . such tenant shall be deemed to possess an absolute power of disposition, within the meaning and subject to the provisions of the three last preceding sections.

This power is both general and beneficial.

It is, therefore, an absolute power of disposition within section 81, which says that where such power of disposition is given to the owner of a particular estate for life, or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future es-

tates limited thereon in case the power should not be executed, or the lands should not be sold for the satisfaction of debts.

Here the power is given to the owner of a particular estate for life, and there was a remainder limited upon the estate for life in a certain specified contingency. If no sale was made, and either devisee died without issue, and without executing the power, the remainder was limited to the other.

What is the import of this last named section? Does it mean to declare that in respect to creditors and purchasers the estate shall be changed into an absolute fee, and therefore if levied on by creditors, or conveyed to any purchaser, they shall take an absolute fee? or does it mean, that, though deemed an absolute fee as to creditors and purchasers, it shall nevertheless remain subject to be divested by the limitation over, in case the power to devise shall not be executed, or the land be not sold for debts?

If the former, then a conveyance extinguishes the power as respects the rights of a pnrchaser, and destroys the limitation.

If the latter, it would operate simply and only as a conveyance of the life estate, because the estate would still be subject to the execution of the power to devise, and the limitation, even in default thereof, would still take effect. This makes the statute work no change, except in case the property should be taken for debts.

It means, that, although the power is, by the will, a power to devise only, it shall be construed to be an absolute power of disposition, and the estate shall be deemed an absolute fee as to purchasers and creditors, and a purchaser will therefore take title.

But if the power (*i. e.*, the absolute power of disposition), be not executed, and the land be not sold for the satisfaction of debts, it shall remain subject to the limitation over which may then take effect.

The two following sections are, I think, in harmony with this view. If I am correct in this, the defendant will obtain, by the deed tendered, a safe and secure title.

The judgment should be affirmed.

A majority of the judges concurred.

Judgment affirmed with costs.

FREELAND *v.* VAN CAMPEN.

March, 1864.

Plaintiff and defendant being liable, respectively, as maker and indorser of a note, on which, as between themselves, plaintiff, the maker, was indebted only for a part, plaintiff gave defendant a negotiable draft on a third person and his own note, together equaling his indebtedness; which defendant received, as expressed in their agreement, "in full payment" of the note on which both were liable.

Held, That defendant was not thereby made bailee, or agent of plaintiff, but became the principal debtor, and plaintiff was liable as surety only.

Defendant having negligently failed to collect the draft, the parties agreed each to contribute to pay the note on which they were liable; and plaintiff, by defendant's authority, subsequently sued on the draft, and by compromise recovered a part thereof.—*Held*, That plaintiff could recover of defendant the residue of the sum he had contributed to pay the principal note.

James Freeland sued George Van Campen, in the supreme court, to recover money paid for his use and at his request.

Among the items allowed by the judge at the trial (which, by consent of the parties, was without a jury), was one which the plaintiff claimed under an agreement between himself and the defendant, in which the defendant agreed to pay a certain note for two thousand six hundred and sixty dollars, made by the plaintiff and indorsed by the defendant. The plaintiff alleged that the defendant did not so pay the note, but that afterward the plaintiff, at the request of the defendant, paid a large sum on the note, part of which had been repaid by the defendant, but of which there still remained due a considerable amount, which the plaintiff claimed. In support of his case, the plaintiff proved a receipt made by Van Campen, in substance as follows: "Received from James Freeland the draft of Messrs. Alny & Wilcox, of Cincinnati, on Messrs. Duncan, Sherman & Co., of New York, for one thousand five hundred and ninety-seven dollars and fifteen cents, together with his note for three hundred and eighty-four dollars and ninety cents, which said draft and note are in full payment for a note

given by said Freeland for two thousand six hundred and sixty dollars. (Signed) GEO. VAN CAMPEN."

The plaintiff also proved an ageement between himself and the defendant, stipulating that as the draft mentioned in the former agreement had not been paid at maturity, the plaintiff should, for the present, but without in any respect changing or altering the rights or liabilities of the parties, take care of so much of the note of two thousand six hundred and sixty dollars as was represented by the draft.

The plaintiff then proved that in consequence of this agreement, he had paid on the note one thousand six hundred and twenty dollars and eighty-three cents (which was the sum represented by the draft), only one thousand five hundred and twenty-nine dollars and fifteen cents of which had been repaid by the defendant. He now demanded the balance, with interest from the time of payment. The nature of the defense and the facts in support of it are given in the opinion.

Judgment was given for the plaintiff, and affirmed by the court at general term, and defendant appealed.

C. Tucker, for defendant, appellant.

A. G. Rice, for plaintiff, respondent.

BY THE COURT.—HOGEBOOM, J.—The rights of the parties depend upon the true construction to be given to transactions between them at their different dates.

On February 27, 1854, the plaintiff purchased of the defendant lumber, the supposed quantity of which entitled the latter to compensation to the amount of two thousand six hundred and sixty dollars, and for this amount the plaintiff gave to the defendant his negotiable note, indorsed by one Blackmore, payable at the Leather Manufacturers' Bank in New York, on May 31, 1854. This note was shortly thereafter negotiated by the defendant at the Steuben County Bank, and both parties became liable upon it. Before its maturity, and on May 29, 1854, the plaintiff and defendant accounted together in regard to the lumber, and by measurement ascertained a deficiency in the quantity, which entitled the plaintiff to a deduction of six

hundred and sixty-seven dollars and ninety-five cents from the purchase price; so that the true amount for which he was liable to the defendant on account of the lumber was one thousand nine hundred and eighty-two dollars and five cents, instead of two thousand six hundred and sixty dollars. Some provision, therefore, was to be made for this; especially as the two thousand six hundred and sixty dollar note would mature in a few days. The plaintiff was then in possession of a good and collectible draft drawn by Alny & Wilcox, of Cincinnati, on Duncan, Sherman & Co., of New York, payable without grace on June 1, then next. This was less than his just indebtedness to the defendant by the sum of three hundred and eighty-four dollars and ninety cents. The plaintiff thereupon executed and delivered to the defendant his note for the last named sum, payable on August 1, thereafter, at the Leather Manufacturers' Bank, in New York, and also indorsed and delivered to him the draft before mentioned, *in full payment* of the note of two thousand six hundred and sixty dollars. This agreement was reduced to writing at the time. The legal effect of it was, I think, as between the present parties, to make the defendant, and not the plaintiff, liable to pay the two thousand six hundred and sixty dollar note at the Steuben County Bank. The plaintiff had put into the defendant's hands available paper to pay so much of that note as he was equitably bound to pay. He had, in fact, negotiated or sold to the defendant such available paper in full payment and extinguishment of such liability. The defendant could doubtless have realized the full amount by negotiating it at the Steuben County Bank. If he had done so, and had procured the discount of his own paper for the balance, the two thousand six hundred and sixty dollar note would have been paid, and both parties would then have remained liable, as between themselves, for precisely what was equitable between them. This was doubtless what was intended. At all events, for a perfectly valid price and consideration, to wit: the plaintiff's note, payable at a future day, and the Cincinnati draft, also not yet matured, the plaintiff paid so much of the two thousand six hundred and sixty dollar note as he was, as between the parties, bound to pay, and these were received *in payment*. Such is

the language of the written contract, and there is nothing in the case to alter or qualify its effect.

The legal effect of the transaction was not, as the defendant's counsel supposes, to make the defendant the mere bailee or agent of the plaintiff to negotiate and collect the draft and small note, and apply the proceeds to the extinguishment of the two thousand six hundred and sixty dollar note. Even if such was the transaction, the defendant neglected his duty in not promptly transmitting the draft for collection, and if the plaintiff in any way subsequently paid of this amount of two thousand six hundred and sixty dollars more than by this agreement it was intended he should pay, it is not perceived why he ought not to be permitted to recover it as money paid for and on account of the defendant. By reason of the defendant's negligence in forwarding the draft for collection, it was not seasonably protested, and the plaintiff was discharged from his liability as indorser.

On August 10, 1854, the parties made a further agreement in writing, reciting the foregoing facts, and that the two thousand six hundred and sixty dollar note and the one thousand five hundred and ninety-seven dollar and fifteen cent draft were still unpaid, and stipulating that for the present the plaintiff should take care of so much of said note of two thousand six hundred and sixty dollars as equaled the amount of the draft, and that the defendant should take care of the balance; but without in any respect altering existing, or creating new or different, liabilities of the parties to each other or to other persons.

After this explicit statement and reservation of their rights, I do not see how, by this arrangement, the position of the parties was in any respect changed. The plaintiff must by this time have paid his three hundred and eighty dollar and ninety cent note, for it had just previously matured, and nothing further is said about it. He was also legally discharged from his liability on the draft because it had not been duly protested. On the same day he performed his part of the agreement of that date by paying one thousand six hundred and twenty dollars and eighty-three cents on the two thousand six hundred and sixty dollar note, the defendant paying the bal-

ance. It being necessary to take measures to collect the draft, the defendant placed it in the plaintiff's hands for that purpose. It was prosecuted against Duncan, Sherman & Co., by the advice of defendant, and in his name, the defendant giving the plaintiff written authority for that purpose, and authority to receive and control the proceeds when collected. The suit brought against Duncan, Sherman & Co. was ultimately, and on February 26, 1857, compromised, with the advise and consent of the defendant, upon payment of the principal of the draft, without interests or costs. The plaintiff's costs, sixty dollars, and eight dollars for exchange, being deducted by the attorneys from the same. The balance, one thousand five hundred and twenty-nine dollars and fifteen cents, was put into the plaintiff's hands on February 26, 1857. The difference between this sum and the amount paid him in August, 1854, with interest thereon, was the amount which the plaintiff recovered on the trial, with the exception of one or two small items of claim and set-off which were not disputed.

The plaintiff was entitled to recover this amount. The rights of the parties were fixed by the agreement of May 29, 1854, and were not altered by the agreement of August 10 following. The arrangement for taking up the two thousand six hundred and sixty dollar note was temporary one, and the amount then paid by the plaintiff wholly in excess of what was due from him. The debt was the debt of the defendant, and the plaintiff in effect his surety on the note. The draft was subsequently prosecuted for the benefit of the defendant, and the expenses of collection lawfully deducted from the amount with which the plaintiff was otherwise chargeable. By giving effect to this arrangement, the intentions of the parties will be carried out, justice done, and the legal rights of the parties preserved.

I think the judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

FREER *v.* STOTENBUR.

June, 1866.

Reversing 36 *Barb.*, 641.

The lessor or reversioner, under a lease of lands for agricultural purposes, has a right of action for the injury done to the inheritance by the wrongful removal of stone from a quarry on the lands.

Such a lease, especially where it is accompanied by a license to the lessee to remove stone yielding a share thereof to the lessor, does not pass to the lessee the right to work the quarry, as lessee, even though it be one that was opened and worked before the lease was made.

A judgment recovered by a tenant, in an action against a trespasser who justified under a void tax sale of the premises, is conclusive against the same defendant, on the question of the validity of the tax sale, when interposed in another action brought by the reversioner to recover for the injury to the inheritance.*

George G. Freer and Cynthia Ann, his wife, and John T. Durkee, sued Abram Stotenbur, in the supreme court, to recover the value of certain stone, taken by defendant from land owned by the plaintiff Cynthia and leased by the plaintiff Durkee.

In 1839, one Watkins owned the land in question, consisting of a farm of about one hundred and twenty-five acres. He leased it for twenty years to John T. and Asher S. Durkee. The lease was at a rent of fifty dollars per year and taxes, and required the lessees to build a small house on the land; to reserve and protect twenty acres of the best timber on fifty acres; to sell none, and to protect all the timber on the remaining seventy-five acres; to clear land, fence it, destroy weeds, plant fruit trees; to sow no flax, plow no meadow; commit no waste; keep buildings and fences in repair.

Indorsed upon this lease, under the same date as the lease, was a license from Watkins to the lessees, to get or sell stone off the premises, by yielding Watkins one-half the stone sold by them.

Asher S. Durkee subsequently assigned his interest in the

* See Boyer *v.* Schofield, vol. 1 of this series, p. 177, and Craig *v.* Ward, *Id.* p. 454.

lease to John T. Durkee; and Watkins died in 1851, devising the land to his widow, Cynthia Ann Watkins.

In 1844, the trustees of the village of Havana, within the limits of which part of the land lay, assessed it for the expenses of certain local improvements, and the assessment remaining unpaid, the village authorities sold the land for nonpayment, to one Tracy, for the term of nine hundred and ninety-nine years, and conveyed, or leased it to him accordingly. Upon the part thus sold was a ledge or quarry, mainly in the highway, from which stone had been taken at various times, commencing at a period long before the making of the lease by Watkins to Durkee. Tracy, who bought the premises at the tax sale, conveyed them to one Cook, who licensed the defendant, Stotenbur, to quarry and carry away stone.

The owner, Mrs. Watkins, and the lessee, Durkee, claimed that the assessment was void, for some irregularity; and an action of trespass was first brought, in the name of Durkee, the lessee, against Stotenbur, to recover damages for breaking his close and removing the stone. Stotenbur justified under the tax sale and license from Cook, the grantee of Tracy, and Durkee insisted that the tax sale was void, and prevailed in the action; but he only recovered six cents damages, together with costs.

Mrs. Watkins, the devisee of the reversion, took an assignment from her husband's executors of all the remaining assets of the estate, and also assigned to Durkee one undivided half of all claims for stone taken from the premises.

Meanwhile, she had married George G. Freer, and they, with Durkee, brought this action against Stotenbur.

The referee before whom the cause was tried found the above facts, except that his findings did not describe the terms of the lease nor refer to the license indorsed, but merely stated that the lease was made "for agricultural purposes." He was of opinion that defendant did not acquire an adverse possession, even as against Durkee, for Durkee's possession was not disturbed, except as his fence was undermined by digging; (citing, Redfield *v.* The Utica & Syracuse R. R. Co., 25 *Barb.* 54; Stetson *v.* Veasie, 2 *Fairf.* 408;) and certainly not adverse as against the co-plaintiffs, under whose title Durkee claimed.

1 *Hilliard's Abr.* 422, § 21; Jackson *v.* Hardenburgh, 4 *Johns.* 390; Clark *v.* Hughes, 13 *Barb.* 147. He was also of opinion that the judgment against defendant in the action of Durkee, the tenant, estopped defendant from contesting the validity of the tax sale as against the reversioner in the present action, but did not bar the present action, because the reason why only nominal damages were recovered in the former action was, that for the damage to the freehold the reversioner must sue. He accordingly gave judgment for the actual damage to the inheritance, with interest from the commencement of the action, not for the value of the stone after removal.

The supreme court, at general term, reversed this judgment. They were of opinion that a tenant for life, or for years, or for a single year, has the right to work a mine or quarry that has been worked and is open at the commencement of his tenancy; for it has become the mere annual profit of the land. See *Taylor Landl. & T.* §§ 774, 776, 784, 165; 5 *Coke Rep.* 12; 1 *Cow.* 468, 474; 1 *Platt on Leases*, 21; *Woodfall Landl. & T.* by Harrison, 463; *Willard Eq.* p. 373.

If the mine or quarry be not open, the tenant cannot work it unless the right to do so is expressly granted by the owner of the reversion. But when it is open, a lease of the land in which it exists, in general terms, carries the right to the lessee to work the same. They, however, placed their decision upon the ground that the plaintiffs were not entitled to recover, for the reason that the right of action for the quarrying or taking away the stone was vested in the lessees named in the lease, or whoever had their interest in it. The right to recover for damages done in the removal of stone belonged to Durkee as tenant under the lease, and not as assignee from the owners of the fee.

From their order granting a new trial, plaintiffs appealed, stipulating that if it should be affirmed, judgment absolute might be rendered against them. Pending the action Mrs. Freer died, and her husband and Orlando Hurd, executors, were substituted for her as plaintiffs.

John H. Reynolds, for plaintiffs, appellants;—Cited *Bacon*

Abr. Waste, C, 3; 2 *Roll Abr.* 816; Moyle *v.* Moyle, *Owen,* 66; 5 *Coke,* 12; Van Deusen *v.* Young, 29 *N. Y.* 9; 1 *R. S.* 750, § 8; 13 *R. S.* 5 ed. 39; Schermerhorn *v.* Buell, 4 *Den.* 422; 1 *Saunders,* 312, note 5; Jesser *v.* Gifford, 4 *Burr.* 2, 141; Repka *v.* Sergeant, 7 *Watts & S.* 1; Livingston *v.* Mott, 2 *Wend.* 605; Evans *v.* Evans, 2 *Camp.* 491; 2 Maule *v.* Selwin, 499; *Taylor on Landlord and Tenant,* § 774; *Dayt. Surr.* 2 ed. 280; Murray *v.* Blatchford, 1 *Wend.* 583; Bogart *v.* Hertell, 4 *Hill.* 492, 510; McKeen *v.* Judd, 12 *N. Y.* (2 *Kern.*) 622, 624; Gillet *v.* Fanchild, 4 *Den.* 80; Van Wilklen *v.* Parslen, 14 *Barb.* 656; 2 *Kent Com.* 351; Zabriskie *v.* Smith, 13 *N. Y.* (3 *Kern.*) 322, 324; *Code* § 111; Morgan *v.* Varick, 8 *Wend.* 591; Forrest *v.* Thompson, 5 *Barn. & A.* 826; 1 *Chitty Pl.* 10 Am. ed. 156.

Francis Kernan, for defendant, respondent;—Cited, 18 *N. Y.* 337; Bourne *v.* Taylor, 10 *East,* 189; Coates *v.* Cheever, 1 *Cow.* 460, 474, 476–477; Neel *v.* Neel, 19 *Penn.* 323, 327, 328, and cases cited; Irwin *v.* Covode, 24 *Id.* 162; Billings *v.* Taylor, 10 *Pick.* 460; Stoughton *v.* Leigh, 1 *Taunt.* 402; Saunder's Case, 5 *Coke.* 12; *Willard Eq. Jur.* 372, 373; *Taylor's Landlord and Tenant,* §§ 774, 776, 784, 165; 1 *Platt on Leases,* 21; *Woodfall's Landlord and Tenant,* by Harrison, 463; Attersoll *v.* Stevens, 1 *Taunt.* 183, 198; Cook *v.* Champ. Trans. Co., 1 *Den.* 91, 104; 1 *Taunt.* 200, 201; 108–203; 4 *Kent,* 1 ed. 77; 1 *R. S.* 1 ed. p. 750, § 8; 3 *R. S.* 5 ed. p. 30, § 8; *Code,* §§ 144, 148; Van Deusen *v.* Young, 29 *N. Y.* 9, 26; Morgan *v.* Varick, 8 *Wend.* 587; Holmes *v.* Seely, 19 *Id.* 507; Frost *v.* Duncan, 19 *Barb.* 560; Green *v.* Clarke, 12 *N. Y.* (2 *Kern.*) 343-345.

By the Court.—Davies, Ch. J.—This action was brought to recover the value of certain stone taken and removed by the defendant from lands owned by the plaintiff's testatrix, Cynthia Ann Freer, the daughter and devisee of Samuel Watkins, deceased. The co-plaintiff, John T. Durkee, was the lessee of said premises, but as the action proceeded only for the injury to the reversionee, and no claim was made on the trial for the damages to the lessee, he may be regarded as an unnecessary party, and his name can be stricken from the record. *Code,* § 173.

[The learned judge here stated the findings of the referee.]

The judgment was not reversed on questions of fact. This court, therefore, is confined in its examination of this appeal to the injury, whether, upon the facts found by the referee, the plaintiffs were entitled to recover, and secondly, whether any errors were committed by the referee, in the admission or rejection of evidence, and also, whether the motion for a nonsuit was properly refused. The motion for a nonsuit was based mainly upon the ground that the stone taken belonged to the tenants or holders of the lease, and not to the owner of the inheritance or reversionee. It is clear, that, if this position be tenable, the plaintiffs could not recover in this action, as it appeared, and was not controverted, that Durkee, the lessee, had recovered nominal damages against this defendant for the injury which he as tenant had sustained.

This action is maintained under the provisions of the Revised Statutes, which declare that a person seized of an estate, in remainder or reversion, may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years. 3 *R. S.* 5 ed. p. 39, § 8; Van Deusen *v.* Young, 29 *N. Y.* 9; Schermerhorn *v.* Buell, 4 *Den.* 422. The reversioner has, therefore, clearly sustained an injury to the value of the stone taken and carried away, unless the position assumed by the defendant be correct—namely, that the stone belonged to the tenant or lessee, in which event no action can be maintained by the reversioners for their possession. This ground is sought to be maintained upon the finding of the referee, that stone had been taken from said ledge,—that is, the ledge upon the premises of the reversionee,—at various periods for thirty years past, at different points along the same; and the authority of Saunders' case, 5 *Coke*, 12, and the various cases in which the doctrine there laid down has been affirmed, are invoked as sustaining it.

Assuming, therefore, that this quarry or ledge was open at the date of the lease to Durkee, does it follow, upon the authority of Saunders' case, that he was entitled to the stone therein by virtue of his lease? It is to be observed, that the premises were leased to Durkee *for agricultural purposes*;

and this would seem to exclude, by the terms of the lease, the right to take and quarry stone from the lands demised.

In Saunders' case, he brought an action of waste against Manwood, assignee of the lessee of the tenements, for waste done in digging sea coals; and, on great deliberation, it was resolved, That if a man hath land, in part of which there is a coal mine open, and he leases the land to one for life or for years, the lessee may dig in it; for inasmuch as the mine is open at the time, &c., and he leases all the land, it shall be intended that the intent is as general as his lease is,—namely, that he shall take the profit of all the land, and, by consequence, of the mine in it.

Now it is seen that the principle of this case is inapplicable to that now under consideration. No such intendment can arise in this case as was found in that, for here the land was leased for a particular purpose or object, and by the express terms of the lease, its enjoyment by the lessee was limited to the defined use—namely, for agricultural purposes. It cannot therefore be intended that under the lease to Durkee, he should take the profit of all the land, and of the quarries and mines upon it. His estate and interest were limited and defined, and he took therein only what was necessary for its use and enjoyment for agricultural purposes; and the intendment which the case might raise when the lease contained no specification or restriction, as to the use of the demised premises, is rebutted in this case, by the indorsement made on the lease at the time of its execution, and which must be deemed and taken as part thereof—namely, the authorization by the lessor, that the lessees might get or sell stone off the premises described in the lease, by yielding to the lessor one-half of the stone sold by them.

This position is enforced and illustrated by the case of Schermerhorn *v.* Buell, *supra*. The lease there contained a clause in these words: "All the timber in the southeast corner of about five acres, suitable and proper for fuel, *to be left and not cleared.*" The lot was wild and uncultivated at the date of the lease. The defendant entered and cultivated most of the land, and on the five acres in the southeast corner of the lot he cut some trees which were suitable and proper for

fuel, and carried away the timber. For that wrong, that action was brought by the plaintiff, the owner of the land and the lessor. It was held that the lessor had the right, both of property and possession, in the trees, and that he might sue whenever they were carried away and converted to the use of another.

In the case at bar, the lease being a demise of the land for agricultural purposes only, it did not pass to the lessee the right to take and carry away the stone in the quarry upon the demised premises, although the same had been opened anterior to the granting of the lease, and consequently the property therein remained in the lessor, and the removal thereof was an injury to the inheritance.

As to that portion of the stone taken by defendant, before the death of Watkins, the devisor of plaintiffs' testatrix, the right thereto was assigned to Mrs. Freer by the executors of Watkins, and could be rightfully recovered in this action.

The only question, therefore, remaining, is whether the defendant showed any title to the premises from which the stone were taken. He justifies the taking and conversion of the stone on the ground that he had such title. That title was derived through a sale by the trustees of the village of Havana, to pay an assessment for the grading and improving of Steuben street, in said village, upon which street said premises were bounded; and such assessment not being paid or collected, the trustees, claiming to act under the authority of the charter of said village, proceeded to sell the same to pay said assessment; and at such sale, the premises from which said stone were taken, were sold to one Tracy for the term of nine hundred and ninety-nine years, and a conveyance executed to him therefor, and he subsequently conveyed the same to one Charles Cook; and the defendant took said stone, with the leave and license of said Cook.

In the suit commenced by Durkee, the lessee, against this defendant, for the recovery of the value of the same stone, it was adjudged, that said sale and all the proceedings thereon were invalid and void, and conferred no title upon said Cook; and the referee in this action found, as a conclusion of law, that, by the judgment aforesaid, it was determined that the same

corporation sale was void and did not protect the defendant, and that such adjudication was binding upon the defendant in this action. This judgment is binding on this defendant, upon this question, and he cannot be permitted again to litigate the validity of these proceedings, and of the title acquired by the assessment sales under them. Embury *v.* Conner, 3 *N. Y.* (3 *Comst.*) 511; White *v.* Coatsworth, 6 *N. Y.* (2 *Seld.*) 137; Castle *v.* Noyes, 14 *N. Y.* (4 *Kern.*) 329. These authorities clearly establish the proposition that this defendant cannot again litigate the validity of that sale, and the title of his licensor under it.

The order granting a new trial should be reversed, and judgment on the report of the referee affirmed, with costs.

All the judges concurred.

Order for new trial reversed, and judgment on the report of the referee affirmed, with costs.

FRENCH *v.* THE BUFFALO AND ERIE RAILROAD COMPANY.

December, 1868.

A carrier, undertaking to carry goods at the owner's risk, is not liable for injuries arising from negligence, unless it be gross negligence, or, at least, the want of ordinary care.*

In the case of goods carried by railroad, it is not sufficient to prove that the injury resulted from a railroad accident, the causes of which are not explained, and which it does not appear affirmatively would have

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* Cited, on this point, in Breese *v.* U. S. Telegraph Co., 48 *N. Y.* 132, 142. Consult, also, besides the cases cited in the opinions, Camden, &c. R. R. Co. *v.* Burke, 13 *Wend.* 611; Stoddard *v.* L. I. R. R. Co., 5 *Sandf.* 180; Bissell *v.* N. Y. Central R. R. Co., 25 *N. Y.* 442; reversing 29 *Barb.* 602; Lee *v.* Marsh, 43 *Barb.* 102; S. C., 28 *How Pr.* 275; Moriarty *v.* Harnden's Express, 1 *Daly*, 227; Prentice *v.* Decker, 49 *Barb.* 21; Keeney *v.* Grand Trunk R. R. Co., 47 *N. Y.* 525; affirming 59 *Barb.* 104; Penn *v.* Buffalo & Erie R. R. Co., 3 *Lans.* 443; Place *v.* Union Express Co., 2 *Hilt.* 19; and Simmons *v.* Law, reported in this series.

been prevented by the exercise of ordinary care and diligence on the part of the company and its servants.*

John M. French, Elijah Bottom, and David Stiles, sued defendants for damages for default as carriers.

Defendants undertook to transport from Rochester a quantity of stoves for the plaintiffs, "at the owners' risk." The cars containing the stoves were thrown off the track and the goods injured, and plaintiffs brought this action to recover their damages.

The details sufficiently appear in the opinion.

The supreme court gave judgment for plaintiffs, on the report of a referee, and defendants appealed to this court.

George F. Danforth, for the plaintiffs, respondents;—Cited, Scheffelin *v.* Harvey, 6 *Johns.* 169; Alexander *v.* Greene, 3 *Hill*, 9; Wells *v.* Steam Navigation Co., 2 *N. Y.* (2 *Comst.*) 204; 8 *N. Y.* (4 *Seld.*) 375; Parsons *v.* Monteath, 13 *Barb.* 353; Dorr *v.* N. Y. Steam Navigation Co., 11 *N. Y.* (1 *Kern.*) 485; Moore *v.* Evans, 14 *Barb.* 524.

WOODRUFF, J.—It is not insisted, upon the argument of the appeal, that any error was committed by the referee in the admission or rejection of evidence, and the only exceptions urged upon our attention are, first, those which depend upon the construction and legal effect of the terms "owner's risk," which were written upon the receipts given by the defendant for the goods delivered for carriage, which words, the referee finds, formed part of the contract between the parties; and, second, the question whether there was any evidence that the injury to the plaintiffs' goods was the result of such negligence of the defendant as is not included in the exemption imported by the words thus written upon the receipts.

And, on the part of the respondent, it is not questioned that the terms "owner's risk" entered into and formed part of the contract between the parties, limiting the the responsibility of the defendants according to the just import of those terms.

* On the question of burden of proof, see Lamb *v.* Camden, &c., Trans. Co., 46 *N. Y.* 271, reversing 2 *Daly*, 454.

It is not argued, and it is far too late to argue, that a party having goods to be carried is not at liberty, if he choose, to enter into a special contract with the carrier, modifying and restricting the liability of the latter, and assuming any of the risks of the transportation which, but for such contract, the law imposes upon a common carrier. The idea that public policy forbid such contracts and does not permit the owner of goods to act freely in that regard, and himself to bear any such risks, if he can thereby promote his own interest in the reduction of the price of carriage, though at one time prominently put forth, never had any sufficient foundation in reason, principle or authority, and has been very distinctly repudiated. See New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 *How. U. S.* 382, 342, 393, 417; Schieffelin *v.* Harvey, 6 *Johns.* 170, 180; and cases collected in Mercantile Mut. Ins. Co. *v.* Chase, 1 *E. D. Smith*, 115, 139; Parsons *v.* Monteath, 13 *Barb.* 353; *Ang. on Carr.* ch. 7; Wells *v.* The Steam Navigation Company, 8 *N. Y.* 375.

It is claimed, however, that the contract imported by the words "owner's risk" does not exempt the defendant from any other than those perils of transportation which may result in injury to the property notwithstanding ordinary care and diligence is exercised by the defendant and its servants.

Or, more briefly, that it does not exempt the defendant from liability for an injury to the plaintiffs, resulting from the want of ordinary care and skill on the part of the defendant's servants.

It is said that the law will not suffer a man to claim immunity by contract against his own fraud or negligence. In Wells *v.* Steam Navigation Company, Mr. Justice GARDINER says, that, though this be so, a man may nevertheless contract against liability for the negligence, even gross negligence, or the fraud or felony, of his agent, or those in his employment; and no sufficient reason can, I think, be urged to the contrary; provided, always, the contract clearly shows such to be its just meaning.

A party may certainly consent to place the instruments and agencies which he is employing in his business at the service (*pro hac vice*) of another, undertaking to set them in motion

under the scheme or plan of management which he has established, and say, "you shall have the benefit of my enterprise, my machinery, my servants, my rules, regulations and scheme of administration, but I propose that you shall take the hazards of every thing but my own fraud or gross negligence, and regard me as in no respect insuring or guaranteeing the fidelity or the prudence, diligence or care of those servants, whom I have no reason to distrust, but who may, out of my personal presence, neglect their duty or prove otherwise unfaithful." There is no sound reason for denying, that, if a contract is made on those terms, and, presumptively, for a much less compensation to be paid, it shall not bind the parties. It may be safely assumed, that, in this country at least, men of business are shrewd enough to take care of their own interests, and that if a party consents to such a bargain, it is because it is for his interest to do so; he expects to make or save money by relieving the other party from risks which he is willing to assume, and in general his expectation is realized. There is neither honesty nor policy in permitting him, when a loss happens through one of the risks he consented to bear, to deny the binding force of his contract.

This is now the rational view of the subject which is recognized as law.

The cases, however, very properly, I think, hold that the contract ought to be so explicit as to leave no reasonable doubt of its meaning and intent.

Where particular risks are specified, the contract may operate according to its terms, but when terms of doubtful or double meaning are employed, the general rule binding common carriers to a stringent liability will determine the construction, because when the carrier insists that an exception has been created which modifies or suspends the general rule, he must show that the exception has been created. So where the terms of the exception are general, but can be reasonably satisfied by a limited construction, the courts have shown a disposition to confine their operation within what they have deemed reasonable limits.

Hence it is said the terms "at the risk of the owners" or "owner's risk" (as in the present case), ought not to be deemed

to except every risk which can possibly be suggested. That it is not reasonable to suppose that a shipper or owner would understand or intend thereby, that the carrier should be under no responsibility, however inadequate or unsuitable his means of safe transportation, and however careless, reckless or dishonest his servants may be.

Hence it is said, that, when an agreement is relied upon, it ought to be clear and explicit, or it will receive that construction which may be most rationally deemed according to the intent of the parties, or, in short, the exemption claimed should appear in a form clear and unequivocal.

In accordance with this view of the subject it is held that such general terms as are above referred to, do not exempt the carrier from the consequences of his own fraud or neglect of the duty which he *undertook* to perform, and do not exempt him from liability for the fraud, bad faith or gross negligence of the servant whom he employs for its performance.

Such is the doctrine of Schieffelin *v.* Harvey, 6 *Johns.* 170, of Alexander *v.* Greene, in our late court of errors, 7 *Hill*, 533, of New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 *How. U. S.* 342, and of Wells *v.* Steam Navigation Co. in this court, 8 *N. Y.* 375.

In the last case the doctrine is expressed to be that a contract in such general terms does not exempt the party from liability for the "gross negligence" of his servants, and that is deemed to be the rule settled in Alexander *v.* Greene.

Sir WILLIAM JONES distinguishes between ordinary negligence and gross negligence and slight negligence thus: "Ordinary neglect is the omission of that *care* which *every man* of *common prudence* and capable of governing a family, takes of his own concerns." "Gross neglect is the want of that care which every man of common sense, how inattentive soever, takes of his own property," and "slight neglect is the omission of that diligence which all circumspect and thoughtful persons use in securing their own goods and chattels." And Mr. Justice STORY gives in substance the same definitions of these terms. "Ordinary negligence may be defined to be the want of ordinary diligence, gross negligence to be the want of slight diligence, and

slight negligence to be the want of great diligence." *Story on Merchants*, § 17.

This is the recognized and accepted distinction between the different degrees of negligence (see Scott *v.* De Peyster, 1 *Edw. Ch.* 513, 542–3), a distinction which is often found of but little practical importance when dealt with by the jury on the trial of a cause, but one which the courts are bound to regard in the determination and application of the rules of law.

The finding of the referee in the present case and his conclusions thereupon, show most clearly that he has held the defendants liable not simply and only for "gross negligence," but for the want of ordinary care or "ordinary negligence."

In Schieffelin *v.* Harvey, the point decided was, that the carrier was liable for embezzlement by the crew or other person while the goods were in the possession of the carrier's servants, though no fault or negligence was imputable to the owner of the vessel personally. In Alexander *v.* Greene, the supreme court had held, that the defendants were not liable for negligence of their servants, although it be found to be gross negligence, and affirmed a nonsuit granted at the circuit. The court of errors decided that there was evidence upon which the jury might have found that the defendants' servants were guilty of gross negligence; that the defendants were responsible for such negligence; and that the question, whether the defendants were guilty of gross negligence, should have been submitted to the jury.

In the case in the United States court, the court were of opinion, that there was gross negligence, and the defendants were held liable therefor—one of the judges, indeed, deemed the negligence to amount to a marine tort. And the only point decided in this court, in Wells *v.* Steam Navigation Co., was, that, under such general exemption as "at the risk of the owner," the defendants were liable for the gross negligence of their servants.

The language of the opinion does not invariably discriminate between gross negligence and the want of ordinary care, but the point decided did not extend the liability of the defendants further than for gross negligence.

But, according to my view of the proofs in this case, it is not necessary to pursue that inquiry.

If the defendants are only liable for the gross negligence of their servants, then, upon the proofs in this case, the plaintiffs should have been nonsuited. When the plaintiffs rested their case, there was no proof except that the goods were "shipped" in good order, and were broken. Upon the defendants' proofs there was nothing shown on which gross negligence of the defendants' servants could be predicated.

But more than this, there was no evidence of want of ordinary care.

Without inquiring whether, when the plaintiff had shown that the contract of the defendant was not performed, that was enough to put the defendant to proof in explanation, it is clear, I think, that, when the defendants did show in explanation that the goods were broken in consequence of the cars running off or being thrown from the track, in course of the transportation, he brought the case within the purview of the exemption contained in the contract. Under the contract, the general rule is, in terms, transportation at the owner's risk; the qualification which the cases referred to establish, is, that injuries resulting from fraud, bad faith or gross negligence, are excepted. When, therefore, the cause of the injury appeared, the defendants were, *prima facie*, excused, unless it be true that the mere fact, that the freight car was thrown from the track, is evidence of gross negligence; or, in the aspect in which I propose to consider the state of the proofs, is evidence of want of ordinary care. See cases below cited. It would be a most fortunate fact in regard to security to life and limb, as well as safety to property, if it were presumptively true that ordinary care is sufficient to guard against such accidents. Most unfortunately they do happen from various causes, against which the utmost caution, vigilance, skill and discretion is required, and which, when used, often prove ineffectual. Surely, the mere fact of the accident did not prove gross negligence.

But the defendants laid their whole case before the referee; and if the plaintiffs proved no negligence, still, if upon the whole proof, the finding of the referee was warranted, it is now of no importance by whom the evidence was furnished.

It is not necessary to repeat what has so often been said in this court, that where there is conflicting evidence this court has no jurisdiction of the question whether the referee has found against the weight of the evidence, his judgment having been affirmed in the supreme court. I repeat the observation that we may not be misunderstood when it is added, that if there be such absence of evidence of the matter alleged, that the party should have been nonsuited, or, that it would be erroneous to submit the question to the jury, if the issue were before a jury, then, if due exception be taken, a question of law is raised and erroneously decided; and an exception, founded on the claim that such was the state of the proofs, this court are bound to consider and decide.

To the finding that the damage to the goods was occasioned by the want of ordinary care and skill; as also to the conclusion that upon the facts found the defendants are liable, the defendants' counsel excepted.

An examination of the question thus raised, makes it necessary to see what it is that was imputed to the servants of the defendants as negligence.

It is found that the goods were well and properly put in a good and suitable box car for transportation. That they were carried by the defendants' usual route. That at Avon the train was made up and inspected (though without manipulation) by the conductor, and he found all about it right as far as he could discover, and the proper person reported that the wheels had been examined and found safe.

The train, soon after leaving Avon, entered upon a descending grade, which continues for about a mile and a quarter. While passing this portion of the road, the alarm rope which ran through the train, by some strain thereon, rang the alarm bell, and so notified the engineer that something was amiss.

And it is expressly found that in the *exercise of due discretion* he understood it to be a signal to stop the train, and he did so as soon as possible, and whistled "down the brakes."

In fact, by some accident which is not accounted for, the train was divided; but the rear cars followed so closely upon those attached to the engine, that the alarm-rope was not broken, and the engineer is expressly found to have acted with

due discretion in what he did; although, if he had known that the train was divided, he should have continued the speed of the engine and forward cars, and so have kept out of the way of the rear cars. Retardation of the engine brought the two parts of the train together, within half a minute, with a concussion which threw some of the cars off the track down an embankment, and so the plaintiffs' goods were damaged.

"Due care had been used to keep the track, and the track was kept, in proper condition up to the time of the happening of this accident." And it was proved by uncontradicted evidence that the coupling was the one ordinarily used upon railroads, and the one "most approved."

The usual manual force was on the train, and consisted of a conductor, an engineer, fireman, two brakemen, and a man who performed the double duty of brakeman and oilman.

Now, up to this point, not only no gross negligence, and no want of every proper diligence is found; but the contrary.

The facts found, from which the inference of negligence is drawn, are these:

At the moment the separation of the cars occurred, the conductor was in the rear car, which was a passenger car. The duties of the man who acted as oilman and brakeman required him to be in the passenger car "as much as to be anywhere else," and he was there, and he and the conductor both sprang to the brake and worked it *as soon as they could*. Another brakeman was on the top of one of the box cars, which continued to be connected with the engine, examining and seeing to the condition of the alarm rope, which, it was shown without dispute, it was his duty to do; and "it does not appear where the third brakeman was, or that any brakeman was at a brake;" and it is found, as a fact, that "no brakeman was at a brake."

The referee does not find that the absence of the brakemen caused the two parts of the train to come together; or, that they could have prevented it, or its consequence,—the engine being stopped, in the exercise of due discretion, while the cars were not so far divided as to break the alarm rope. But he indulges a conjecture, that "instant and proper letting down of the brakes on the rear car *might* have so dimished the force of

the concussion as to have avoided the catastrophe, if the train was in proper running order."

And the referee has carefully excluded any presumption that he may have found other facts on which to base a conclusion of negligence, which are not specifically stated in his findings, by adding, that it does not otherwise appear how the accident occurred, nor what was its immediate cause.

Now, in all this, I discover nothing warranting an inference of any negligence.

1. The alleged absence of the brakeman from the brakes, if that was negligence, is not ground for charging the defendant, unless such absence caused the injury. It is not found that it did, or that their presence would have prevented it. Nor did any witness so testify, or give even an opinion to that effect.

2. The conjecture which is stated in the findings, that the instant and proper letting down of the brakes on the rear car *might* have diminished the force of the concussion, is relieved wholly from any implication of negligence by the other facts found. The brakeman was on that car, and where his duties required him to be as much as at the brake ("as much as any where else"), and not only he but the conductor, with prompt endeavor to assist, "sprang to the brake and worked it as soon as they could." Here is not only no negligence, but a finding of instant diligence, and a doing therein all they could do.

3. The finding, that the second brakeman was on the top of a box car, engaged in seeing that the alarm rope was in order, is certainly not a finding of negligence; and the uncontradicted proof was, that the handle of the brake of the box cars rises to the top of those cars, so that, though not proved to have been standing over a brake at either end, he was in truth within convenient reach of one or the other. But this is wholly immaterial, for the obvious reason, that if he had been at the brake, no working thereof, however instant or efficient, could tend, in the slightest degree, to prevent the concussion or its consequences, but the contrary. It would have been far better if the car on which he stood, and the others connected with it and with the engine, had advanced more rapidly, instead of being retarded.

There remains the circumstance stated by the referee, that the cause of separation does not appear, whether by the breaking of a coupling or the flying out of a coupling-pin, or from some other cause. Then, surely, it could not be inferred that it was caused by negligence. An attempt was made to show that a linch-pin might have prevented the separation, but the proof clearly showed that ordinary care did not require it, and besides that, the linch-pin is more likely to fall out by the agitation of the cars than the coupling-pin.

And the referee further finds that it does not appear where the third brakeman was.

As to this and as to the circumstance last noted, they do not prove want of ordinary care. In the case in the supreme court of the United States, already twice referred to, Mr. Justice NELSON, says: "The respondents" (defendants) "having succeeded in restricting their liability as carriers by the special agreement, the burden of proving that the loss was occasioned by the want of due care or by gross negligence, lies on the libelants, which would be otherwise in the absence of any such restriction." This bears with great force upon the whole conclusion of the referee; and as to the third brakeman, if his presence at any brake where it was his duty to be, was material, his absence should have been proved. It is not enough to say he was not proved to be there. This doctrine is also stated by the late lamented chief judge of this court in a very able opinion affirming the binding effect of the very words now in question—"owner's risk," and holding that where such a contract is made, it is the plaintiff who must prove the want of due care or gross negligence if he would recover; no presumption arises against the carrier. The plaintiff cannot rely on the absence of proof, he has the affirmative of the allegation. See Moore *v.* Evans, 14 *Barb.* 524, 530.

This is not a case of conflicting evidence, nearly every fact I have referred to is found by the referee; there is no conflict as to any other.

I cannot find warrant for any finding of gross negligence, or even want of ordinary care; the testimony given by the defendants, on the contrary, proves ordinary care at least, and that without contradiction.

The conclusion of negligence has been found rather upon what is not proved. Every servant, of whose acts there is evidence, and whose acts could have any influence to prevent injury, is shown and substantially found to have been prompt, active, diligent and discreet; and, as to any servant, there is no evidence that he was not so.

I think the judgment should be reversed. It is quite obvious that, if the case is to be tested by the inquiry whether the plaintiffs established gross negligence, there could be no reasonable pretense of claim.

MILLER, J.—The determination of this case depends upon the construction to be placed on the contract made for the transportation of the property. The receipts given provided that it was to be forwarded at the "owner's risk;" and the question is whether these words include only the risks of breakage arising from the ordinary dangers of railroad transportation when due care has been observed by the carrier, and whether the carrier is liable for damages incurred beyond these risks.

The carrier may by special contract restrict his common law liability; and where this is done his relations are changed and he becomes as to that transaction an ordinary bailee and private carrier for hire, which imposes upon him the responsibility of exercising ordinary care in the transportation of property. Moore *v.* Evans, 14 *Barb.* 524, 530; Dorr *v.* New Jersey Steam Nav. Co., 11 *N. Y.* 485, 493.

In Wells *v.* Steam Navigation Co., 8 *N. Y.* (4 *Seld.*) 375, in a contract by the owners of a steamboat used for towing boats upon the Hudson river, from New York to Albany, for hire "at the risk of the master and owners," it was held that the owners of the steamboat were liable for injuries arising from the gross negligence of their servants navigating it, although not occasioned by fraud or want of good faith, and that the phrase employed has reference to the perils of navigation not arising from the gross negligence of the contractor. This construction is not in conflict with some other cases to which we have been referred. Schieffelin *v.* Harvey, 6 *Johns.* 170; Alexander *v.* Green, 3 *Hill* 9, and 7 *Id.* 533, 547. Where

the goods are transported at the risk of the owner the burden of proving that the loss was occasioned by gross negligence or a want of due care is upon the owner. 14 *Barb.* 524, 530.

The question then arises whether there is any evidence to warrant the conclusion that the defendant was guilty of such negligence, such want of due care, as authorized a recovery.

The referee has not found that the defendant was guilty of a want of care as to the cars; the making up and coupling of the train; the condition of the track; in using and obeying proper signals promptly at the first appearance of danger; or in the proper rate of speed, or the care and skill of the engineer; but he assumes that the damages were occasioned by the want of ordinary care and skill on the part of the servants of the defendant. He does not inform us in what that want of care and skill consisted, and it is difficult to see upon what evidence his finding was based. The train parted and there is no affirmative proof as to the cause, although according to the opinion of one of the witnesses, it was occasioned by the coupling pin flying out or breaking. The strain on the rope attached to the engine bell, caused the bell to ring, which was mistaken for a signal to stop the train, which signal was given and the engine stopped. If the engineer could have known that the train had parted, he would not have given the signal, and thus the collision would have been averted. But he was not to blame for this mistake and could not have known it, and, therefore, he was not guilty of negligence.

The finding of the referee that there was no brakeman at the brake, I think, is not supported by the evidence. There is no proof whatever to support it, and as the plaintiffs were bound to make out affirmatively the negligence of the defendant, it was erroneous. The referee also finds that because the accident occurred there was a want of precaution and care. This, I think, was also erroneous, as it by no means follows without proof, as a necessary result, that an accident of this kind is occasioned by a want of due care and caution. It might have occurred with all the care that properly could have been exercised, and been the consequence of circumstances beyond the control of those who had charge of the train. Accidents of this character are sometimes unavoidable, and such are the perils of

railroad transportation, that no human foresight or prudence can guard against them. These were the risks against which the contract provided, and which the owners of the property assumed to take upon themselves. It is apparent, I think, that the plaintiffs utterly failed to establish that degree of negligence which was essential to maintain the action, and that the referee erred in his conclusion, and therefore the judgment must be reversed, and a new trial granted, costs to abide the event.

A majority of the judges concurred.

Judgment reversed, and new trial ordered, costs to abide event.

FRENCH *v.* NEW.

June, 1863.

Reversing 30 *Barb.* 431.

An executory covenant, under seal, cannot be discharged by a parol arbitration.*

After a sealed submission to arbitration requiring a written award has been made, a verbal agreement of the parties to accept a verbal award, which the arbitrator accordingly makes, changes the submission to a verbal one; and if the matters be such as cannot be determined by a parol arbitration the award is void.

The fact that one party, by consenting to a verbal award, induced the arbitrators to make such an award, does not estop him from objecting that the matters in controversy could not be determined by a verbal award.†

Luther French sued Philip E. New, in the supreme court,

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* See the authorities in reference to the modification of sealed contracts, by parol, collected in Clough *v.* Murray, 3 *Robt.* 7.

† If the matters submitted had been such as could be determined by a parol award, the acts of the parties might be deemed a wavier or estoppel, precluding the objection that a written award, though called for by the bond, was not made. See the authorities cited by DAVIES, J., dissenting. Burnap *v.* Losey, 1 *Lans.* 111; and Miller *v.* Junction Canal Co., 41 *N. Y.* 98.

to recover the last two installments of rent under a sealed lease, and also recover damages for the breach of several covenants in the lease.

Defendant pleaded and proved that after the first, and before the second of the two installments accrued, the plaintiff, the lessor, entered into arbitration bonds with the defendant, the lessee, and one George A. New, reciting that a controversy existed between plaintiff and the two News in reference to the lease, &c., and binding themselves to submit to the decision of the arbitrators named; and defendant relied on a verbal award, made, under this arbitration, but after the last installment had become due, under circumstances which are stated in the opinion, as a bar to this action.

At the trial plaintiff was nonsuited.

The supreme court, at general term, being of the opinion that the plaintiff had waived the requirement of a written award, and was estopped from objecting that it had not been reduced to writing, and that other objections taken to the nonsuit were untenable, affirmed judgment for the defendant. Reported in 20 *Barb.* 481. Plaintiff now appealed to this court

A. Pond, for plaintiff, appellant.

Merrill & Cowen, for defendant, respondent.

At the March term the following opinion was read:

BALCOM, J.—The lease was for the term of three years. It expired on April 1, 1852. The annual rent was four hundred and twenty-five dollars, and was payable one half on the first day of January, and the other half on the first day of April in each year. The defendant did not pay the last two installments of the same. The lease bound the defendant to leave, at the expiration thereof, eight acres of rye growing on the farm, which he did not do; and the plaintiff proved that by reason thereof he sustained damages to the amount of twenty-five dollars.

According to the arbitration bonds, the parties were to sub-

mit the controversy between them to the decision of Messrs. Taylor, Green and Rowley, as arbitrators (after hearing the testimony of the parties), "*in reference to a certain lease*" (which was the lease in question). The bonds required the arbitrators to make their award in writing, which should be subscribed by them and attested by a subscribing witness, and ready to be delivered, &c., on or before April 18, 1852; to the end that all matters in controversy, in that behalf, between the parties, should be finally concluded pursuant to the provisions of the statute for determining controversies by arbitration.

The arbitration was had on March 27, 1852, which was four days before the lease expired, or the right of action accrued thereon for the last installment of the rent reserved therein, or for the neglect of the defendant to leave eight acres of rye growing on the farm. The plaintiff's claims against the defendant, which he presented to the arbitrators, were for one year's rent of the farm, and for clover seed, timothy seed, wood, oats, stock, &c. The defendant also presented claims before the arbitrators; but the case does not show what they were, except that he claimed he paid too much rent for the farm.

While the arbitrators were deliberating upon the matters submitted to them, the parties agreed as to the manner in which the defendant should pay whatever award should be made against him; and with the view of carrying such agreement into effect, they executed bonds to each other, providing for the payment of such award, whatever it might be, in a certain way and by installments; but it does not appear that those bonds were ever delivered. They recited that the parties had entered into a bond to submit their matters in controversy to Emerson, Green and Taylor, as arbitrators, when the truth was, they had submitted the same to Rowley, Green and Taylor, to determine as arbitrators.

The arbitrators (Rowley, Green and Taylor), were informed by the parties that they need not make an award in writing; that they (the parties) had a writing drawn up, and merely wanted to know how much the award was, and "that they could fix the award on the instrument as they had agreed." The arbitrators agreed to award that the defendant should pay the plaintiff two hundred and sixty dollars, and so informed

the parties, when the plaintiff said he desired to see his lawyer, which he did, and his lawyer immediately served a revocation upon the arbitrators of the submission of the matters to them as arbitrators, and he paid the fees of the arbitrators; and the plaintiff refused to abide by the verbal award, and the arbitrators did not make one in writing. The defendant offered to prove that he had tendered full performance of the award according to the bonds the parties had signed providing the manner for the payment of an award to be made by Emerson, Green and Taylor; which offer was rejected as immaterial.

The verbal agreement of the parties that the award should not be in writing, and that they would abide by a verbal award, had the effect to change the submission, from one under seal to a mere verbal one; because the verbal agreement was acted upon, and that under seal was abandoned. The verbal award, therefore, was not valid, unless a verbal submission of the matters on which the award was made was binding upon the parties.

The principal thing submitted to the arbitrators was the lease of the farm, which was under seal and contained covenants not broken—to wit: the one to pay the last half year's rent, and the one to leave eight acres of rye growing on the farm on April 1, 1852. And it is clear that those covenants could not be discharged by a verbal agreement. See Delacroix *v.* Bulkley, 13 *Wend.* 71; 13 *N. Y.* 556; 5 *Id.* 537.

Nothing was done towards discharging the covenants, not broken, contained in the lease, that amounted to an executed verbal agreement; for the plaintiff did not even say he would perform the award, after it was stated to the parties. The verbal submission of the matters to the arbitrators was an agreement by the parties to do that which the arbitrators should direct, and when they made their decision, that became a thing to be enforced against the plaintiff, if binding, as *being his agreement*. See Walters *v.* Morgan, 2 *Cox Ch. Cas.* 369.

It requires no argument to prove that if the parties had verbally agreed with each other, to do precisely what the arbitrators decided they should do, it would not have bound them. Such a verbal agreement would have been a nullity. "A verbal submission is valid in all cases where the subject matter is such that a verbal agreement directly between the parties in the

terms of the award, would prevail. But where the law, as for instance, the statute of frauds, requires a contract to be in writing, there both the submission and the award must be in writing." *Calw. on Arb.* Vt. ed. 1853, 36, n. 1; see McMullen *v.* Mayo, 8 *Smedes & M.* 298; and Walters *v.* Morgan, *supra.* The same proposition is stated by Mr. HILL, 2 *Hill*, 272, n. a., as follows: "Thus it has been said, that where, from the subject of arbitration, a writing is necessary to pass the right to the thing in demand, or to defeat or destroy the demand, the submission and award, to be available as a bar to that demand, must be in writing." Also see *Russ. on Arb.* 38, Law Lib. 4 series, 95; Mayo *v.* Chiles, 3 *Monr.* 258.

The opinion of the supreme court concedes the general rule to be as above stated, but avoids it by misapplying another laid down in *Kyd's Treatise on Awards*, and holds, that although a verbal submission of the unbroken covenants contained in the lease, by themselves, would not be obligatory, yet being joined with other things of an uncertain nature, a verbal submission of the whole was binding. The rule so misapplied is stated by KYD, when speaking of the subjects of controversy the law permits to be submitted to arbitrators, and his language is, that most of the cases "which cannot be submitted by themselves, may, when joined with other things of an uncertain nature; because then there is an uncertainty in the whole of the dispute; as debt on a bond, whether single or with condition; debt for arrears of rent ascertained by a lease for years; damages recovered by verdict and judgment." It is evident he did not here refer to the mode of submission; for, before leaving the subject, he remarks as follows: "However, in all cases where the demand arises on a deed, it would seem the submission must also be by deed; because a specialty cannot be answered but by a specialty." *Kyd on Awards*, 53, 54.

I have not been able to find the doctrine of the supreme court, on this point, laid down in an adjudged case, or in any treatise on arbitration or awards; and I am of the opinion it cannot be maintained on principle, and it conflicts with the well-settled rule, already mentioned, "that a covenant under seal, not broken, cannot be discharged by a parol agreement." See Suydam *v.* Jones, 10 *Wend.* 180, 184.

I cannot see how the doctrine of estoppel is applicable to the case. The fact that the plaintiff prevented the arbitrators from making a valid award does not deprive him of the right to show the invalidity of the one they did make. The legal presumption is that the defendant knew a verbal award would not be binding, but believed, notwithstanding that fact, that the plaintiff would abide by such a one.

If the foregoing views are correct, the award was void; for the reason that it did not discharge the covenant to pay that portion of the rent of the farm not due at the time the same was made, or the one, not then broken, that the defendant should leave eight acres of growing rye upon the farm on April 1, 1852.

For the foregoing reasons I am of the opinion that the judgment of the supreme court should be reversed, and a new trial granted; costs to abide the event.

DAVIES, J., read an opinion for affirmance, holding, upon the authority of Fidler *v.* Cooper, 10 *Wend.* 285, 290; Baspole's Case, 8 *Coke*, 97 b, 193; Chapman *v.* Dalton, 1 *Plowd.* 290, 298; 2 *Rich.* 318; Athelston *v.* Moore, *Comb.* 547, that the submission, by several persons, to an arbitration, of all matters in difference between them, included all matters that either of them had against the others, severally or jointly. That according to the cases of Ford *v.* Jones, 3 *Barn. & Ad.* 248; *In re* Tunno, 5 *Id.* 488; Matson *v.* Trower, 1 *Ryan & M. N. P. Cas.* 17; Rex *v.* Hill, 7 *Price*, 636; Perkins *v.* Wing, 10 *Johns.* 143; Sellick *v.* Addams, 15 *Id.* 197; Buck *v.* Wadsworth, 1 *Hill*, 321; Howard *v.* Sexton, 1 *Den.* 440, the parties had waived the stipulation of the bond requiring an award in writing; and that, upon the principle established in Welland Canal Co. *v.* Hathaway, 8 *Wend.* 480; and Dezell *v.* Odell, 3 *Hill*, 215; Bank of Genesee *v.* Patchin Bank, 13 *N. Y.* 309, the plaintiff was estopped by his own conduct, which had induced defendant to accept the parol award, from objecting to his prejudice that it was void.

THE COURT, not being agreed, reserved the cause for further consideration, and referred it to Judge MARVIN for an additional opinion.

At the *June term*, MARVIN, J., delivered an opinion, in which he discussed the distinction between a verbal waiver, which cannot dispense with an executory obligation under seal, except in those cases where there are grounds for raising an estoppel, and, on the other hand, a new parol contract, founded on a good consideration, which may be substituted for such an obligation. He came to the same conclusion as BALCOM, J.—that the executory covenant in this case was not discharged by the parol award.

All the judges concurred in this conclusion, except WRIGHT, J., who concurred in the dissenting opinion of DAVIES, J.

Judgment reversed, and new trial ordered; costs to abide event.

FRIERY *v.* THE PEOPLE.

June, 1866.

Affirming 54 *Barb.* 319.

On the trial of an indictment for homicide, evidence of the violent conduct of the accused on the premises of the deceased, and his exhibiting there a weapon similar to that employed in the homicide, and declaring that it "would be the death of somebody here,"—shortly before the fatal affray, is admissible as tending to indicate personal hostility.

Exceptions taken by the prisoner to proceedings on the challenge of a juror for cause, are not open to examination at his instance, on error, if he subsequently, by a peremptory challenge, excluded the juror.

Ownership of real estate is not under the act of 1847, a necessary qualification for jurors in the city of New York.

It is not a good cause of principal challenge, that a presented juror, from what he has heard or read of a particular transaction, has an opinion that a crime has been perpetrated by somebody.

When such juror is challenged for favor, it is not proper to charge the triers that he may be biased by the opinion that a crime has been committed; but the triers should be instructed to determine the question according as they think the juror is impartial, and has no bias against the prisoner, or the contrary.

A juror, challenged for principal cause, testified that he had read of the transaction, had formed an opinion of it, not as to the guilt or innocence of the party charged, but that a party had committed the crime; and

if the party were the prisoner he presumed him to be the guilty party; but had not actually formed an opinion that F. (the prisoner), was either innocent or guilty of killing L. (the deceased).—*Held*, that a challenge for principal cause was not sustainable.

Proper instructions to the triers of a challenge to the favor,—stated.

The mere expression of an opinion by the officer, designated by law to summon jurors, as to the merits of a cause that may chance to be on the calendar of the court for trial, or in respect to the guilt or innocence of a party under indictment, is not matter for challenge to the array.*

The neglect of the officers of the court to pursue the directions of the statute in the mode of drawing and summoning jurors, is not, in the absence of any suggestion of fraud or of injury to a party, a ground of challenge to the array.†

Bernard Friery was indicted and tried in the court of general sessions, in the city of New York, for the murder of one Henry Lazarus. There was little contest upon the facts of the case; and the only questions in this court related to the regularity of the proceedings.

The prisoner and the deceased kept adjoining liquor saloons in the city of New York. Several hours after midnight on January 3, the prisoner with three companions all under the influence of liquor, and in the course of a disorderly carousal, entered the saloon of the deceased; and, after some challenges to fight had been addressed to the deceased by one of the prisoner's companions, and a remonstrance against any disturbance had been interposed by Lazarus' barkeeper, the prisoner offered to shake hands with Lazarus, but Lazarus refused, whereupon the prisoner drew a knife and stabbed him mortally, and then fled, saying, "I guess I have fixed him." When arrested Friery acknowledged he had killed him, and said he would dance at his wake. The exceptions appear in the opinion.

* The same rule was applied in Ferris *v.* People, 35 *N. Y.* 125; affirming 48 *Barb.* 17; S, C., 1 *Abb. Pr. N. S.* 193; decided about the same time as the case in our text; and see Gardiner *v.* People, 6 *Park. Cr.* 155, 192; People *v.* McGeery, *Id.* 653; People *v.* Rogers, 18 *Abb. Pr. N. S.* 370; and cases in note; People *v.* Mallon, 3 *Lans.* 224; Ruloff's Case, 12 *Abb. Pr. N. S.* 245.

† Consult also People *v.* Mallon, 3 *Lans.* 224; People *v.* Allen, 43 *N. Y.* 28; and *L.* 1872, c. 475; under which an opinion or an expression thereof is not necessarily ground of challenge for principal cause.

The supreme court, on a writ of error, held that the object of the statute regulations as to the drawing and summoning of jurors was not the securing an impartial array, as towards the prisoner, but the impartial distribution among the citizens of the onerous duty of jury service. The other questions they also determined against the prisoner on the same grounds as those taken in the opinion of this court. They accordingly affirmed the conviction. (Reported in 54 *Barb.* 319.)

The defendant brought a writ of error to this court.

John Sedgwick and *John McKeon*, for the plaintiff in error; —That the statute as to jury was imperative,—Cited *Dwarr.* 715; Striker *v.* Kelly, 7 *Hill*, 9; Marchant *v.* Langworthy, 6 *Hill*, 646; Rex *v.* Loxdale, 1 *Burr.* 447; Perry *v.* Hulse, 9 *Cow.* 435; Gardner *v.* Turner, 9 *Johns.* 261; Queen *v.* O'Connell, 9 *Jur.* 27; 11 *Clark & Fin.* 1 *Cox Cr. Cas.* 441; Precedents in 4 *Chit.* 310; *Crown Circ. Compan.* 104; Rex *v.* Dolby, 1 *Car. & K.* 238; 1 *Crawf. & D.* 125; 2 *Moody & Scott*, 41; *Joy on Juries*, 126; People *v.* Cancemi, 18 *N. Y.* 129; Cunningham *v.* Cassidy, 17 *Id.* 278; People *v.* Cook, 14 *Barb.* 293; 8 *N. Y.* 67; U. S. *v.* Wyngall, 5 *Hill*, 51; Jackson *v.* Young, 5 *Cow.* 269; People *v.* Dawson, 25 *N. Y.* 405; People *v.* Ransom, 7 *Wend.* 418; Wakeman *v.* Sprague, 7 *Cow.* 721; People *v.* McClosky, 5 *Park. Cr.* 5, 308. That the challenges to the jurors should have been sustained; King *v.* Edmonds, 4 *B. & Ald.* 492; People *v.* Hunyman, 3 *Den.* 122; People *v.* Freeman, 4 *Id.* 13; Lowenberg *v.* People, 27 *N. Y.* 342; People *v.* Knickerbocker, 1 *Park. Cr.* 303.

A. Oakey Hall, district-attorney, for the people.

By the Court.—Wright, J.—[After recapitulating in detail the circumstances of the homicide and showing that the evidence, which was undisputed, disclosed a clear case of murder:]

Under the statute of 1855 (*L.* 1855, p. 613, c. 337, § 3), our jurisdiction extends to ordering a new trial, if satisfied that "the verdict was against the weight of evidence or against law,

or that justice requires a new trial." Manifestly, there was no injustice in this case, in the verdict of the jury; the evidence and the circumstances under which the homicide was perpetrated, called for no other; it was, in truth, a case of wanton killing without any provocation. It cannot be contended, for a moment, that the accused did not design to kill. Not under the impulse of sudden passion (for there had been no provocation to arouse it), he comes upon the deceased, and with inhuman and fiendish spirit and intent, plunges a deadly weapon, that had been before concealed upon his person, into a vital part of the neck of his victim; it is very clear that unless the accused was prejudiced in his trial by some erroneous legal ruling, "justice does not require" a reversal of the conviction. Various exceptions and objections were taken on the trial. Some of them are insisted on as valid in the points of counsel, but none were confidently urged on the argument as errors of a nature to demand a new trial, except the one relating to the drawing and summoning of the extra panel of one thonsand jurors for the term of the court at which the trial was had. These objections, however, insisted on now, though not urged at length, and which relate to the impanneling of the jury and the admission and rejection of evidence, will be briefly noticed, before attending to what is claimed to be a fatal error in the ease. I think it will be seen that none of them are tenable.

1. *The rulings of the court as to evidence.* It appears that although the accused and the deceased were maintaining the same kind of business, the former, from some unexplained cause, was in the habit or visiting the latter, and there drinking himself and treating strangers to drinks. Between four and five o'clock of the morning before the homicide, he made one of these visits; he had with him a two-edged dagger knife, having a blade seven or eight inches long. Leaning against the counter, he drew the knife from his pocket and plunged it into the counter saying, "that will be the death of somebody around here before long," or "somebody here;" Lazarus was not present. On the evening of the same day (Lazarus being absent), he came in again, stepped to a lunch table; eat something; seized the mustard cup from the table, threw it across the room and left the premises. About two weeks be-

fore the homicide, between seven and eight o'clock in the morning, he came in with one of his companions, and called for a drink; there was a Newfoundland dog, kept by Lazarus, lying sick under the table; before drinking he took an ice pick from his pocket, and hit the dog three or four times on the head, then, taking part of his drink, he commenced beating the dog again, and thrust the sharp end of the ice pick into the dog's mouth, breaking out some of his teeth. He was finally persuaded by his companion to desist. These several acts and declarations of the accused upon the premises, and with the property of Lazarus, were, under objection, allowed to be proved by the prosecution.

This was not error. The evidence was admissible as bearing upon the question of malice in the commission of the crime with which the prisioner was charged. Proof of exhibiting at the scene of the homicide, the morning before its perpetration, the identical weapon with which the fatal blow was given, accompanied by the declaration, "that that would be the death of somebody around here before long," was not only competent, but exceedingly pertinent testimony. The occurrence as to the dog was of lighter weight, but still it was not incompetent testimony. Proof of any act of the accused in reference to the deceased, or his property, about the time of the fatal occurrence, indicating, or tending to indicate, feelings of personal hostility, toward the deceased, was competent.

2. On the cross-examination of Lazarus' bar-keeper, he was asked, "Did a part of the custom of that house come from women?" The question was objected to as irrelevant and immaterial, and excluded under exception. There is no point in the exception. It was of no sort of importance what were the classes or sex of the customers of Lazarus.

3. It appeared, as has been stated, that just before leaving for Lazarus' saloon, Clark, McDonald, California Jack and the accused were together in the bar-room of the latter. On the examination of a witness on the part of the accused, he was asked, "Do you know what, if anything, was said between California Jack, Clark, McDonald and Friery, in his (Friery's) bar-room?" The district-attorney objected to the question, and the objection was sustained. It is unnecessary to say a

word in justification of this ruling. It was utterly immaterial what they talked about as affecting any issue in the case.

4. Six persons drawn as jurors were challenged for principal cause by the counsel for the prisoner. The court held that the challenges were not sustained by the evidence adduced in their support, and they were challenged peremptorily by the prisoner. Two others so drawn were challenged for favor, and found by the triers to be indifferent, and were peremptorily challenged by the prisoner. Two others so drawn were, in the first place, challenged for principal cause by the prisoner's counsel.

The court found the causes of challenge untrue. They were then challenged for favor, and found indifferent by the triers. These were, also, peremptorily challenged by the prisoner. In each of these cases, exceptions were taken to overruling the challenges for principal cause; and also to the charges or instructions of the recorder to the triers.

It is now urged that these exceptions are open for examination and review, and that if there were error in the proceedings upon the challenges for cause, though the jurors were ultimately excluded by the peremptory challenges of the prisoner, he is entitled to a reversal of the judgment.

This is not so. Questions raised previous to the peremptory challenge of these jurors, are not open for examination at this instance. As was said by the distinguished judge, in delivering the opinion of the court, in the case of Freeman *v.* People, 4 *Den.* 9, "The prisoner had the power and the right to use his peremptory challenges as he pleased, and the court cannot judicially know for what cause or with what design he resorted to them. He was free to use or not use them, as he thought proper: but having resorted to them, they must be followed out to all their legitimate consequences. Had he omitted to make peremptory challenges, his exceptions growing out of the various challenges for cause, would have been regularly here for revision. But he chose by his own voluntary act to exclude these jurors, and thus virtually, and, as I think, effectually blotted out all such errors, if any, as had previously occurred with regard to them." All questions in respect to the ten jurors mentioned (the proceedings on the challenges of whom f

cause, are set forth at large in the bill of exceptions) are out of the case. The accused, having used his peremptory challenges, having chosen by his own voluntary act to exclude them, cannot be heard to allege exceptions, if any, existing as to those jurors prior to such challenges.

Eight persons, however, were drawn and served as jurors, to whom challenges were interposed by the prisoner's counsel, and it is to be seen whether any error occurred with regard to them, either in overruling the challenges for principal cause, or in the recorder's charges to the triers.

First. James R. Davies, on being called, was challenged on the ground that he did not own real estate, and had not been taxed for personal estate. The juror testified that he did not own any real estate, had not yet been taxed for it, but expected that he would be during the year. The recorder overruled the challenge. This was not error. The provisions of the Revised Statutes respecting property or assessment qualifications of jurors (2 *R. S.* 411, § 13), were repealed, as to the city of New York, by and act passed in 1847, entitled "An act in relation to jurors in the city of New York." 2 *L.* 1847, p. 734, c. 495.* That act declared, that it should not be necessary as a qualification for any juror in the city of New York, that he should be actually assessed therein; but that all persons, residing in the city, who should be qualified to serve as jurors, and not exempted by any of the laws of the State, should be selected as such, whether they had been assessed or not. The objection to the juror was therefore untenable.

Second. Charles E. Hadden, on being called, was challenged for "principal cause." The bill of exception does not show, in terms, what cause of challenge was alleged, but from the scope and character of the evidence, it seems to have been that the juror had formed an opinion *that a crime had been committed.* The juror testified in substance, on being interrogated by prisoner's counsel, that from the general conversation in the court room, and from what he had heard over the bar, he had formed an opinion that a crime must have been committed,

* For the present act as to New York city, see 2 *L.* 1870. p. 1293, c. 589; 2 *L.* 1872, p. 1296, c. 585,

but had no impression whatever whether the party who is indicted is the party who did the thing.

The challenge was properly overruled by the court. It is not a good cause of principal challenge, that a presented juror, from what he has heard or read of a particular transaction, has an opinion that a crime has been perpetrated by somebody. The juror was then challenged for favor, and the triers passed upon this challenge upon the same testimony; the prisoner's counsel requesting the court to charge the triers, that if the juror had made up his mind that a crime had been committed, he might be biased by that, although he had no impression as to who committed it. The recorder declined to give the instructions requested, but charged the triers as he had before charged, in general terms, that if they thought, after hearing the testimony of the juror, that he has a bias against the prisoner, they must say the challenge has been sustained; if they say, he is impartial and has no bias, they must say the challenge has not been sustained. There was no error in refusing to give the instructions requested, but on the contrary, the instructions given were guardedly correct. In fact there was nothing in the evidence to support the challenge to justify the request. There was not a scintilla of proof tending to show that the juror challenged had made up his mind even upon the abstract question of whether a crime had been committed.

Third. Nathan Brewster, on being called, was challenged for principal cause. On being interrogated by the prisoner's counsel, he testified that he had read something of the transaction at the time of its occurrence, referring to the homicide of Lazarus, but had formed no opinion about it. From what he read he thought there had been some crime committed. On being interrogated by the court, he further testified that he had formed no opinion at all as to whether the prisoner is guilty of the crime with which he is charged. The challenge is overruled.

It is claimed in the points of the prisoner's counsel, that the court should have rejected this juror, for the reason that he had read something of the transaction, and had formed an opinion that a crime had been committed. There was nothing to show that the juror had formed any opinion in respect to

the transaction, either as to its legal character or as to the guilt or innocence of the accused on trial; but it may as well be said, once for all, that it is no sufficient ground of principal challenge that a proposed juror, from reading or hearing of a particular homicide, gets an impression on his mind, or concludes that a crime, and one of murder, had been committed, without any reference as to who was the perpetrator. The law has not reached the point of positively disqualifying a juror for forming or expressing an opinion as to the legal character of a given transaction,—*e. g.*, whether, as in this case, the killing of Lazarus was a criminal act,—irrespective of any opinion or knowledge as to who committed the act.

Fourth. John Wood, on being called, was first challenged for principal cause. He testified, on examination of prisoner's counsel, that he had read of the transaction in the papers; could not say that he had formed any opinion as to the guilt or innocence of the party charged; formed the opinion that the party had committed a crime. On the question being put to him by the district attorney, whether he had actually formed an opinion that Bernard Friery was either guilty or innocent of killing Harry Lazarus? he answered no. The challenge was properly overruled. The juror had formed no opinion either as to the guilt or innocence of the accused on trial. He had read an account of the homicide in the papers, and had come to the conclusion that the party charged had committed a crime. This, as has been said, did not legally disqualify him.*

The juror was then challenged for favor, and further exam-

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* The examination of Wood, upon challenge by the prisoner for principal causes, was as follows:

Q. Have you read of this transaction?

A. I have.

Q. Have you formed an opinion as to it?

A. Yes, I have.

Q. As to the guilt or innocence of the party charged?

A. I cannot answer as to the guilt or innocence. I formed the opinion that the party had committed a crime.

Q. Then, if the party was the prisoner, you have formed an opinion?

A. I presume he is the guilty party. I would have an opinion, if he is the prisoner.

By the District-Attorney:

jned, both by the prisoner's counsel and the district-attorney. The recorder charged the triers, in substance, that it was for them to determine whether the juror was indifferent between the prisoner and the people; that no rule of law could be laid down to determine this with unerring certainty; it was not a question to be solved by any rule of law, but by the common sense of the triers. They were to hear what the person called as a juror answers; to look into his mind, to see its condition, and if, after examining that, they come to the conclusion that he is impartial between the prisoner and the people, has no bias one way or the other, it was their duty to say that he is competent, and that the challenge is not sustained. But, if after considering the state of his mind, they find to the contrary, that he was not indifferent, they should say so, and sustain the challenge.

These instructions were unexceptionable.

Fifth. John H. Hasen, on being called, was challenged in the first place, for principal cause. On being interrogated, he answered in substance that he had read of this matter (the in-

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Q. Have you actually formed an opinion that Bernard Friery is either guilty or innocent of killing Harry Lazarus?

A. No.

The court ruled that the challenge for principal cause was no sustained.

Upon challenge by the prisoner for favor, the same juror testified:—

Q. Did you have your mind made up as whether or not a crime had been committed?

A. Yes.

Q. You still have an opinion as to that?

A. I still believe that a crime had been committed.

Q. You believe that the party who was charged was guilty of that?

A. I cannot answer that question.

Q. I mean, charged by the papers, not charged here.

A. I can only recollect the names of two parties.

Q. Who were they?

A. Harry Lazarus and Bernard Friery.

Q. Who was Harry Lazarus?

A. He was the party charged to have been killed.

Q. Who was Bernard Friery?

A. The party who committed the deed.

Q. You believed that he did it?

A. I have no belief on the subject. I know that the paper said so.

terrogatory probably referring to the matter on trial, though not in terms stated); he did not know but he might, at the time he read of it, have formed an opinion on this matter; his memory was rather treacherous; should not have remembered the principal facts stated in the newspapers, if he had not heard them recounted since he had been in the court room; had no impression or belief as to whether what he read in the paper was true or not; did not recollect of having any impression as to whether the party charged by the newspapers did what the newspapers said he did. The challenge was overruled properly, as there was not a scintilla of evidence to support it.

Sixth. Benjamin F. Eaton, being called, was challenged for principal cause. He testified that he heard the matter spoken of at the time, and thinks he must have said something about it, but is not positive; thinks it must have been something like this: that if the party charged did commit the murder, he ought to be punished; and if the principal facts were true that he heard, he has that opinion now. On being interrogated by the district-attorney, he stated in substance, that from a con-

Q. From that, did you not make up your mind that he did it?

A. I had a presumption that he was the party.

Q. You have that still, have you not?

A. Yes.

Q. You have a presumption that Bernard Friery committed a crime?

A. I have—unless the evidence should change that.

Q. You would need some evidence to change it, would you not?

A. Yes, certainly.

By the District-Attorney:

Q. I understand you have an impression, if the facts you read in the papers were true, that Friery was probably guilty?

A. If they were true.

Q. But, suppose it should turn out that it was not true, you could acquit him, could you not?

A. Certainly.

Q. Suppose it should turn out that Bernard Friery killed Lazarus because it was necessary to protect his own life, would you not render a verdict accordingly?

A. Certainly.

Q. In other words, you have no impression derived from what you have heard that would bias your mind against the sworn evidence you would hear as a juror?

A. No.

versation in the shop (where was all he heard about it), he had derived an impression that some one had killed Lazarus, but who was the person charged with the killing he did not know; it might have been told to him, but he had no remembrance of it; thinks he has an impression that somebody was taken up for it, but does not remember the name or anything about the man; had no fixed opinion in his mind founded on what he heard talked of; that the man, whoever he was, that was taken up, was guilty or innocent of killing him. The challenge was properly overruled. It was totally unsustained by the evidence. The person had no opinion as to the guilt or innocence of the accused. In fact, he had nothing that would be called an opinion, or even an impression of the mind, upon any feature of the case.

Seventh. William H. Hicks, being called, was challenged for principal cause. He testified that he had read and talked of the matter, but had formed no opinion as to it; thinks he has formed an opinion as to whether a crime was committed, but has never expressed it. His opinion that a crime was committed, attaches to no individual; the challenge was overruled. It is unnecessary to repeat what has been before said, that the formation or expression of an opinion as to the legal character of a given transaction, attaching criminality to no particular individual, and especially not to the accused, who is on his trial, is no sufficient ground for principal challenge.

Eighth. Charles F. Newton, on being called, was challenged for principal cause. He testified that he had read about the matter in the *Herald*; his reading did not lead him to the formation of any opinion; he had an opinion from the reading, that a difficulty had occurred in a drinking saloon between two parties, the result of which difficulty was that a person was injured, and afterwards died; he believed that was a crime; to the best of his recollection, the article in the newspaper charged some person with the act which caused the death; the challenge was overruled. I imagine it would be difficult to assign any valid reason for rejecting this juror. The evidence fell short of sustaining even the favorite point of the prisoner's counsel, that he had formed an opinion from reading an account

of the affair in the newspaper, that a crime had been committed.

I have thus gone through at length the same proceedings on the challenges of the persons sworn as jurors. In my opinion there was no pretext for alleging error, either in the recorder's decisions of the principal challenges, or in his instructions to the triers, when challenges were interposed to the favor. In the former the challenges were not sustained by the evidence, and in the latter the judge's instructions were guardedly correct and remarkably free from usurpation of the triers' province. There was no error in deciding or sustaining or instructing, substantially, that the formation or expression of opinion, or the possession of a bias, was immaterial, unless that such opinion or bias was against the prisoner, *per se*.

The remaining matter to be considered is in respect to the challenge to the array. The court, in addition to the regular and usual panel, had ordered an extra panel of one thousand jurors to be summoned for the sessions or term at which the prisoner's trial was moved. This was done under the authority of the act of December, 1847 (before referred to), creating the office of commissioner of jurors for the city of New York, and defining his powers and duties, section 9 of which provided that after the commissioner had completed the petit jury list, and delivered a certified copy thereof to the county clerk, and the clerk had prepared the ballots and deposited them in the box in the manner required by law, "the several courts in the city may order as many jurors to be summoned for their respective courts as in their judgment may be necessary." *L.* 1847, c. 495. This act further provided that jurors for the several courts in the city should, on requisition made by such courts respectively, directed to the county clerk, "be drawn from the petit jury box in his office, a minute of which drawing shall be certified and filed with such clerk as now required, who shall deliver a copy thereof to the officers authorized to summon such jurors, who shall proceed to summon such jurors in the manner now required by law." § 4. It was conceded that the panel of jurors was to be drawn and summoned, as directed in article 2, title 4, c. 7, third part of the Revised Statutes, entitled "Of the return and summoning of jurors." 2 *R.*

S. 410. The directions are to this effect: The clerk is to give notice of the drawing, and serve a copy of such notice on the sheriff of the county, and upon the first or some other judge of the county courts, three days previous to the time appointed by him therefor. At the time so appointed, it is made the duty of the sheriff, in person, or by his under sheriff and the first or other county judge on whom such notice shall have been served, to attend at the clerk's office to witness the drawing If the sheriff or county judge so notified do not appear, the clerk is to adjourn the drawing until the next day, and by written notice require the delinquent sheriff or judge, or some other county judge or any two justices of the peace, to attend such drawing on the adjourned day. If on the adjourned day, the sheriff or under sheriff and a county judge or justices of the peace appear, or if any two county judges or justices of the peace appear, but not otherwise, the clerk is to proceed, in the presence of the officers so appearing, to draw the jury. The clerk is to conduct the drawing in a prescribed way, a minute is to be kept, and each name entered thereon as drawn from the box before another ballot be drawn. After the drawing is completed a minute is then to be signed by the clerk and the attending officers, and filed in the clerk's office, and a list o the names of the persons so drawn, with their address and places of residence, and specifying for what court they were drawn, is to be made and certified by the clerk and the attending officers, and delivered to the sheriff of the county. The sheriff is to summon the persons named in such lists to attend such courts by giving personal notice to each person, or by leaving a written notice at his place of residence; and return the list to the court, at the opening thereof, specifying those who were summoned, and the manner in which each person was notified. 2 *R. S.* 413, 414. In the city of New York a copy of the minutes of the drawing, certified and filed with the clerk, takes the place of the list to be delivered to the summoning officer.

On February 13, the drawing and summoning officers named in the statute, filed their statutory certificate of compliance with the statutory forms of drawing and summoning the extra number of one thousand jurors as ordered; which was

received by the court. On the prisoner's trial being moved the same day, he interposed a challenge in writing to the array of the persons upon the panel or list of jurors this day filed in this court, alleging eight grounds of challenge, the first of which was, that the sheriff or summoning officer had formed and expressed an opinion as to the guilt or innocence of the prisoner; and the next seven grounds, a want of compliance with the statutes in respect to the jurors, viz: that the proper officers did not actually attend at, or witness the drawing; that upon the drawing from the petit juror box of the names of the persons now on the panel returned as jurors, no minute was kept by any attending officer as the drawing proceeded; that no minute of the drawing was signed or certified by any attending officer; some of the proper attending officers signed blank certificates which the clerk filled up after the drawing; no copy of the minutes of the drawing was delivered to the sheriff; the sheriff summoned the jury without any copy of the minutes being furnished him; the ballots drawn from the jury box were delivered to him from which he summoned the jurors; and the panel or list filed is not a copy of the minutes of the drawing.

There was no allegation of any fraud or corruption against any of the officers who drew or summoned the jurors, or certified to the list; nor of any injury or prejudice to the prisoner.

Upon a demurrer by the district-attorney, the court sustained it, overruled the challenge, and refused to quash the array; to which ruling the prisoner excepted.

The question is, was this error, entitling the plaintiff in error to a new trial? I am of the opinion that it was not; and that the challenge was properly disallowed.

Plainly the first ground of challenge was without substance. The idea that the mere expression of an opinion by the officer, designated by law to summon jurors, as to the merits of a cause that may chance to be on the calendar of a court for trial, or in respect to the guilt or innocence of a party under indictment, is matter for challenge to the array, is as absurd as it is novel. But this ground was not pressed or relied on in the argument at bar.

The remaining allegations related to the non-observance of certain of the statutory directions in the drawing of the panel,

the challenge averring, in substance, that the clerk drew the jury, without the officers named in the statute being actually present at the drawing; that no minute of the drawing, upon its completion, was signed and certified by the proper officers, and filed with the clerk, nor any copy of such minutes delivered to the summoning officer; but that the ballots drawn from the jury box were delivered to him by the clerk, from which he summoned the jurors, and that after such summoning the ballots were returned by the sheriff to the clerk, and the names were then entered by the latter in a book in his office as the minute of the drawing. Assuming that the truth of the facts, as stated in regard to the drawing, were admitted by the demurrer, was the non-observance of the statute directions and forms in the particulars suggested, grounds of challenge to the array by the prisoner? Certainly not, unless the purpose and intent of the statute for selecting, drawing and summoning persons as jurors were to secure an impartial jury to parties; and to that end, the regulations and forms prescribed were made imperative upon those charged respectively with the duty. In such case it would be the right of a litigant to have the statute regulations and forms strictly complied with, independent of any suggestion of fraud or misconduct. But, in my view, the statute respecting the selecting, drawing and summoning of jurors, was not intended, *per se*, to secure impartial jurors to litigants. The purpose and object of the statutory system were to secure a due and uniform distribution of jury duty, and to guard the great body of jurymen from the fraud or favoritism of the drawing or summoning officers. The statutes establish a mode for these ends, and are directory to those whose duty it is to select, draw and summon. By this system, the courts are supplied with jurors to aid in the administration of the laws. If it were held that the statutes in reference to the selecting. drawing and summoning of persons to serve as jurors were other than directory; if any of the many directions therein contained were to be deemed sufficient to vitiate the whole panel, the consequences would be that the whole fabric of justice would fall to the ground. Suppose, for example, the clerk omits to give public notice of the drawing, or the drawing takes place in the absence of those officers re-

quired to attend and witness it, after there had been an adjournment and a notification by the clerk to attend on the adjournment day, are these irregularities ground for vitiating the whole panel? If so, the business of every court in the State might be impeded if not wholly stopped. The officers named in the statute charged with the duty of attending the drawing as witnesses, by a neglect of such duty would deprive the court of jurors to aid in the administration of the laws. The system contemplates no such result, but on the contrary, was designed and intended to promote a directly opposite purpose. The omission to properly work the statute machinery by the drawing and summoning officers, is a question between the people and those officers; because any fraud or partiality, or improper conduct of such officers injured the public, such conduct was made a misdemeanor. 2 *R. S.* 694, § 18. The machinery may be perverted so as to injure litigants, but in such a case it is the acts of perversion that become cause for challenge and not the mere omission to properly work the machinery, when no injury or prejudice comes to litigants.

The challenge in this case merely alleges a defective working of the drawing machinery, without its terms imputing a perversion thereof to the injury of the accused. It not only omitted express allegations of prejudice to the accused, by the acts or omissions complained of, but showed on its face that by means of the imputed irregularities the same jurors were arrayed who would have been on the panel if every imputed omission had been supplied, or if every act had been technically regular. It asserts, in terms, that the very ballots which were drawn from the box by the clerk, were handed to the sheriff, and each juror whose name was on each ballot was summoned That the jurors were fairly drawn from the box, and that the same persons were drawn and summoned that would have been had the proper officers attended and witnessed the drawing, is to be assumed, since no allegations to the contrary is contained in the written challenge.

I am of the opinion, therefore, that it was not error to disallow the challenge and refuse to quash the array. The acts and omissions complained of, the mere defective working of the statute machinery by the drawing and summoning officers, in

the absence of any suggestion of fraud or misconduct prejudicing litigants, or any misconduct, save a neglect or omission to strictly observe the prescribed regulations, is not ground of challenge to the array.

The judgment should be affirmed.

A majority of the judges concurred.

Judgment affirmed, and record remitted.

GANDALL *v.* FINN.

December, 1863.

Reversing 28 *Barb.* 652.

In the statement of facts in a confession of judgment under section 383 of the Code of Procedure, it is enough that the nature and consideration of the debt confessed, the time in which it accrued, and that it is due and unpaid, are concisely stated. The character and dates of particular items need not be given.*

James R. Gandall, a judgment creditor of Charles Finn, by judgment recovered in the supreme court, applied to the court, on affidavits, to set aside several judgments which defendant had confessed to other creditors, the levies on which were obstacles to his execution. The only ground on which the decision turned was the sufficiency of the statements of the ground of indebtedness in the confession in favor of Thomas W. Lockwood. The statement (after the usual consent to the entry of judgment), was as follows:

"The above indebtedness arose on an account of goods, wares and merchandise, sold and delivered by said plaintiff to me, since January 1, 1855, and for which I have not paid; and I hereby state that the sum above by me confessed is justly due to the said plaintiff without any fraud whatever."

The supreme court held that this statement, and anothe

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* See Acker *v.* Acker, Clements *v.* Gerow, and Ely *v.* Cook, all reported in this series; Read *v.* French, 28 *N. Y.* 285; Frost *v.* Koon. 30 *Id.* 428 Ingram *v.* Robbins, 33 *Id.* 409; Union Bank *v.* Bush, 36 *Id.* 631.

which was still more general, were insufficient, and granted the motion. Reported in 23 *Barb.* 653. Lockwood alone appealed, and the order having been affirmed, as to him, at general term, he appealed to this court.

Mr. Beach, for appellant.

Mr. Northrup, for respondent.

By the Court.—Wright, J.—There is but a single question involved in the appeal, viz: as to the sufficiency of the statement in the confession of judgment in favor of the appellant, Lockwood. The Code provides that the statement, if the debt be for money due or to become due, "must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due or to become due." *Code of Pro.* § 383. It is urged, that in the Lockwood judgment, the statement does not set forth the facts out of which the indebtedness arose, nor show the sum confessed to be justly due, within the meaning of the statute; and this appears to have been the judgment of both the lower courts.

I am not able to see such a non-conformity with the requirements of the statute, as to demand that the judgment should be set aside, at the instance of another judgment creditor. Unless we are prepared to hold that the statement, under the Code, is required to be as special and precise as that under the act of 1818 (*L.* 1818, c. 259, § 6), the one questioned in the present case, is good. But as was said by Selden, J., in Dunham *v.* Waterman, 17 *N. Y.* 9, "there is a wide difference in phraseology between the act of 1818 and the section of the Code in question. The former required a 'particular' statement and specification of 'the nature and consideration' of the debt or demand; and when the demand arose upon a note, bond or other specialty, the 'origin and consideration' of the same was required to be 'particularly set forth;' while the Code in terms simply requires a statement 'of the facts out of which the indebtedness arose.'" In Lawless *v.* Hackett, 16 *Johns.* 149, a case which arose under the act of 1818, the supreme court said, "a statement as general as the common counts in a declaration

is not sufficient. It ought to be as special and precise as a bill of particulars." Neither, however, in Dunham *v.* Waterman, or in any other subsequent case, has this court gone the length of holding that the Code requires the precision of a bill of particulars. It is enough that the nature and consideration of the debt confessed, the time in which it accrued, and that it is due and unpaid, are "concisely" stated. Lanning *v.* Carpenter, 20 *N. Y.* 447; Freligh *v.* Brink, 22 *Id.* 418; Neusbaum *v.* Keim, 24 *Id.* 325; Hopkins *v.* Nelson, 24 *Id.* 518. In the present case, the nature of the debt, the amount thereof, within what time it accrued, and that it is unpaid, are stated. The transaction set forth is a sale and delivery by Lockwood to Finn, of goods, wares and merchandise, between January and December, 1855, of the value of one thousand seven hundred and two dollars and eighty-seven cents, which Finn has not paid for. It is true, the kind of merchandise is not specified, nor at what particular time, between January and December, the sale and delivery was made, if sold and delivered in parcels; but the statement was not defective for this reason, unless the law as it now is, requires all the minuteness of a bill of particulars. It clearly does not require the statement to contain a minute description of the goods sold, or of the time and place, and terms of sale of each particular parcel.

But it is said that merely stating the facts out of which the indebtedness arose is not sufficient; the facts must show that the sum confessed is justly due, and that no fact is stated from which the court can say that the amount of the judgment is justly due. In Lanning *v.* Carpenter, 20 *N. Y.* 447, the confession (unlike the present one) did not state in terms that the sum for which the judgment was authorized to be entered was justly due; and the point then taken was that the statute required it to be stated in terms; but the court thought otherwise, and that the sum due must appear from the statement. "The particular facts," says Judge COMSTOCK, "must be set forth in such a manner as to show not only a just debt, but the amount thereof." That being done, an additional averment, in general terms, of the justice of the debt, and the amount thereof, is not required. It is true that, although the facts stated may show, with all the requisite certainty and detail, the

creation of a debt, yet it may have been paid. So, also, it may have been released or discharged by bankruptcy, insolvency, or in some other manner. But it is not required to negative all the conceivable possibilities of the case. The confession now in question contained an averment, in general terms, that the debt confessed was justly due; but it went further. The statement also showed it. The facts stated not only showed the creation of the debt, but negatived the possibility of its having been paid. After showing, with requisite certainty, the creation of the debt and the amount thereof, it is averred distinctly that the debt is unpaid.

I am of the opinion, therefore, that the order, so far as it affects the judgment of the appellant Lockwood, should be reversed. It would be difficult, I think, to distinguish between the minuteness necessary in a bill of particulars, and the "concise statement" which the learned judge at special term supposed would now only satisfy the requirements of the law. In Freligh *v.* Brink, 22 *N. Y.* 418, the confession was held good when it described the note, and added, 'that amount of money being had by the defendant of the plaintiff." So, also, in Neusbaum *v.* Keim, 24 *N. Y.* 325, a statement was held sufficient which stated that the plaintiff had sold and delivered large quantities of meat to the defendant at various times during the years 1854 and 1855 and that there was justly due him upon such sales a balance of two thousand one hundred and fourteen dollars. In neither of these cases, were the facts set forth with more certainty and detail to show a just debt and the amount thereof, than in the present one.

The order of the supreme court, so far as it affects the Lockwood judgment and execution, should be reversed with costs of this appeal, and his execution declared entitled to be paid out of the proceeds of sales made upon the executions, in preference to that of the respondent Gandall.

A majority of the judges concurred.

Order setting aside Lockwood's judgment and execution reversed, with costs.

is not sufficient. It ought to be as special and precise as a bill of particulars." Neither, however, in Dunham *v.* Waterman, or in any other subsequent case, has this court gone the length of holding that the Code requires the precision of a bill of particulars. It is enough that the nature and consideration of the debt confessed, the time in which it accrued, and that it is due and unpaid, are "concisely" stated. Lanning *v.* Carpenter, 20 *N. Y.* 447; Freligh *v.* Brink, 22 *Id.* 418; Neusbaum *v.* Keim, 24 *Id.* 325; Hopkins *v.* Nelson, 24 *Id.* 518. In the present case, the nature of the debt, the amount thereof, within what time it accrued, and that it is unpaid, are stated. The transaction set forth is a sale and delivery by Lockwood to Finn, of goods, wares and merchandise, between January and December, 1855, of the value of one thousand seven hundred and two dollars and eighty-seven cents, which Finn has not paid for. It is true, the kind of merchandise is not specified, nor at what particular time, between January and December, the sale and delivery was made, if sold and delivered in parcels; but the statement was not defective for this reason, unless the law as it now is, requires all the minuteness of a bill of particulars. It clearly does not require the statement to contain a minute description of the goods sold, or of the time and place, and terms of sale of each particular parcel.

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creation of a debt, yet it may have been paid. So, also, it may have been released or discharged by bankruptcy, insolvency, or in some other manner. But it is not required to negative all the conceivable possibilities of the case. The confession now in question contained an averment, in general terms, that the debt confessed was justly due; but it went further. The statement also showed it. The facts stated not only showed the creation of the debt, but negatived the possibility of its having been paid. After showing, with requisite certainty, the creation of the debt and the amount thereof, it is averred distinctly that the debt is unpaid.

I am of the opinion, therefore, that the order, so far as it affects the judgment of the appellant Lockwood, should be reversed. It would be difficult, I think, to distinguish between the minuteness necessary in a bill of particulars, and the "concise statement" which the learned judge at special term supposed would now only satisfy the requirements of the law. In Freligh *v.* Brink, 22 *N. Y.* 418, the confession was held good when it described the note, and added, 'that amount of money being had by the defendant of the plaintiff." So, also, in Neusbaum *v.* Keim, 24 *N. Y.* 325, a statement was held sufficient which stated that the plaintiff had sold and delivered large quantities of meat to the defendant at various times during the years 1854 and 1855 and that there was justly due him upon such sales a balance of two thousand one hundred and fourteen dollars. In neither of these cases, were the facts set forth with more certainty and detail to show a just debt and the amount thereof, than in the present one.

The order of the supreme court, so far as it affects the Lockwood judgment and execution, should be reversed with costs of this appeal, and his execution declared entitled to be paid out of the proceeds of sales made upon the executions, in preference to that of the respondent Gandall.

A majority of the judges concurred.

Order setting aside Lockwood's judgment and execution reversed, with costs.

GANSON *v.* THE CITY OF BUFFALO.

December, 1864.

Under an order appointing *Joseph* G. as one of several commissioners, *James* G. took the oath of office and acted as such. *Held*, that the mistake being shown to be a clerical error, in the order, it was amendable.

Where the charter of a city requires the common council to make a compensation in money, within a fixed time, for land taken for a local improvement, and makes such compensation a general debt or charge on the city, an action lies against the city therefor, after the time limited expired, although the city have not collected the amount from the parties assessed.*

In such a case, those to whom compensation is due are not restricted to a *mandamus*, as would be the case if the sum were payable out of the assessments.

The provision of the charter of Buffalo requiring a city assessor to be appointed on each commission of assessment for local improvements, is unconstitutional; but this objection is not available to avoid the proceedings of a commission, if it does not appear that such appointment was made; and *it seems* that the unconstitutionality of the requirement does not make it illegal for the court in its discretion to make such an appointment.

After the right of a land owner to compensation from the city, for land taken for a local improvement, has become absolute, under a statute making the compensation a charge upon the city, a subsequent amendment of the charter, declaring awards for lands taken, to be payable within a specified time after assessments to be made upon the parties benefited by the improvement, cannot be applied retrospectively to take away the previously vested right of action.†

The provisions of the charter of Buffalo, section 9 of title 8 (*L.* 1853, p. 501),—requiring an application by the majority of property holders, in order to authorize an assessment for local improvements,—apply only to the improvements mentioned in that section, and do not apply to the other improvements mentioned by section 6 of the same title.

Henry B. Gibson (for whom, on his death pending the action

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* Compare Baldwin *v.* City of Oswego, vol. 1 of this series, p. 62.

† As to the vesting of rights by the exercise of eminent domain, see Brooklyn Park Commissioners *v.* Armstrong, 45 *N. Y.* 234; reversing 3 *Lans.* 429; Detmold *v.* Drake, 46 *N. Y.* 318, and cases cited; Strang *v.* N. Y. Rubber Co., 1 *Sweeny*, 78.

John Ganson and others, executors, were substituted), brought this action, in the superior court of Buffalo, against the city of Buffalo, to recover a sum of money awarded him as compensation for land taken by the city for the purposes of a ship canal.

On the trial the following facts were found. No petition or application whatever was presented to the common council, asking for, or consenting to, the construction of the canal, or the taking of land for it; but on April 20, 1857, the city council adopted a resolution, declaring their intention to take and appropriate certain lands mentioned in the resolution, for the purpose of building the proposed canal. Commissioners were appointed to ascertain the compensation due to the land owners, and on July 31, 1857, these commissioners made and filed with the city clerk their report, which was confirmed on September 7, by which they awarded to the plaintiff nine thousand dollars, as compensation for his interest in the lands described in the resolution. No assessment was ever made or directed, for the purpose of raising the compensation awarded; and after the confirmation of the commissioners' report, the city did nothing toward the construction of the canal, and never entered on the lands.

The portions of the charter material to this case are as follows:

"§ 17. The council, upon the confirmation of any report of commissioners, shall direct the just compensation of the owner or owners, or any person or corporations interested in the property as ascertained by the report, together with the cost and expenses of the ascertainment, to be assessed upon the land benefited by the taking of the property, and the assessment shall be made as in other cases.

"§ 18. Within one year after such ascertainment, the common council shall pay or tender the several amounts of the compensation so ascertained to the respective owners of the property taken; and in case any such owner shall refuse the same, or be unknown, or a non-resident of the city, or for any reason incapacitated from receiving his amount, or the right thereto be disputed or doubtful, the council may make payment of the portion of such owner into the office of the clerk of Erie county, as clerk of the supreme court, accompanied with a

statement of the facts and circumstances of each case, and a transcript of so much of the report of the commissioners as relates to the ascertainment of the portion so paid in."

On the trial plaintiff offered to read in evidence an order of the superior court of Buffalo, dated November 20, 1862,* which, after reciting that persons had been appointed to act as commissioners to ascertain and report the just compensation to be paid to the persons having an interest in the property proposed to be taken for a ship canal, and that one of the persons so appointed was James G. Hoyt, but by a clerical error his name had been entered in the order book as Joseph G. Hoyt, and since it also appeared by affidavit that James G. Hoyt was the person who acted as commissioner in the proceedings directed to be taken by said order, it was ordered that the record be amended by writing James G., instead of Joseph G. Hoyt.

The admission of this order was objected to, on the ground that when it was made the court had no power so to amend the record mentioned in the order. The court overruled the objection, and the defendant excepted. The plaintiff then offered to read in evidence the report of the commissioners, to which the defendant objected, on the ground that it was not signed by all the commissioners,—the order appointing Joseph G. Hoyt, and the report being signed James G. Hoyt. The court overruled the objection, and the defendant excepted.

At the close of the trial the defendant moved to dismiss the complaint upon three grounds, among others:

1. The compensation awarded to the plaintiff was payable out of a particular fund to be raised by local assessment; and it was not shown that any such fund had been created, or that there were any moneys in the defendant's treasury applicable to the payment.

2. No assessment having been made to pay the award, such award was not payable under the provisions of the charter.

3. No demand of the amount of the award was shown to have been made on the defendant.

The request to dismiss was denied, and the plaintiff had a judgment for eleven thousand nine hundred and sixty-five dol-

* After the filing of the report of the commissioners.

lars and eighty-nine cents, which was affirmed by the court at general term, and defendant appealed.

C. Beckwith, for defendant, appellant;—As to misnomer, cited Farnham *v.* Hildreth, 32 *Barb.* 277. As to the merits, (besides cases cited in the opinion) Bloodgood *v.* M. & H. R. R. Co. 18 *Wend.* 9; Carter *v.* Hagarstown Canal, 2 *Carb.* (*Ind.*), 588; Spring *v.* Russell, 7 *Greenl.* 273, 12 *Mass.* 466; Calking *v.* Baldwin, 4 *Wend.* 667; People *v.* Mead, 24 *N. Y.* 123; Baker *v.* Utica, 17 *Id.* 326; People *ex rel.* Green *v.* Mayor &c. 20 *How. Pr.* 491; also 10 *Wend.* 363, 1 *Barb.* 34, 24 *N. Y.* 119, 19 *Id.* 326.

James M. Smith, for plaintiffs, respondents, cited Warren *v.* City of Buffalo (see note on p. 240).

By the Court.—Davies, J.—It is insisted on the part of the defendant that the order amending the original order for the appointment of the commissioners was improperly admitted in evidence. The original order named *Joseph* G. Hoyt as one of the commissioners. Under that order *James* G. Hoyt took the oath of office prescribed for the commissioners, and acted as such, and made and signed the report which was confirmed. It is clear that he was the person intended, and who acted, and who was, in fact, the person appointed. There is no evidence in the case that there was any such person as Joseph G. Hoyt, and, it appearing to the court who made the order appointing the commissioners, that the writing of the word *Joseph* in the place of *James*, was a clerical error made by the clerk thereof, and that James G. Hoyt was the person actually appointed, it was competent for the court to amend the order in accordance with the facts. Such order had relation back to the original order, and made that conform to the truth of the matter. The court did not, therefore, err in admitting the order to amend the original order to be read in evidence, and, the original order being thus in fact amended, there was no error in the admission of the report of the commissioners, from which it appeared that the same was made by the persons named in the order of appointment as amended. The fact is found by the

court, that the commissioners appointed by the court made and filed their report. If it was necessary to resort to the evidence, it is apparent from it that the facts proven abundantly sustain this finding without any aid from the order of amendment. As already observed, it was competent for the court to amend the proceedings to correct clerical errors. But if this amendment was not made, I am unable to see any reason why the report should have been excluded.

The first, second and third grounds of nonsuit urged in the court below were disposed of by this court, in the case of Warren *v.* City of Buffalo, decided at the June term, 1861. That was an action to recover an award made and confirmed by these defendants for a piece of land taken under their charter for a public street.* In the opinion in that case it was said that the compensation due to the owners was ascertained by the report of commissioners, and the report was duly confirmed. Nothing remained to be done, except to make that compensation in money, and this the charter required the common council to make within one year after the amount was ascertained. No doubt that time was given for the purpose of enabling the city government to collect the money by local assessment on the persons or property benefited by the improvment; but the right to proceed and make this collection, or

* In Warren *v.* City of Buffalo it appeared that the common council of the city of Buffalo, having instituted proceedings to take certain land of the plaintiffs, Edward S. Warren and others, for a public street, under the charter of the city, *L.* 1853, c. 230, the commissioners of highways reported an award of four thousand six hundred and seven dollars to plaintiffs for the land proposed to be taken; which report was duly confirmed by the common council. The city, however, never took possession of the property, nor paid the award; but abandoned the proceedings. Thereupon plaintiffs brought this action in the superior court of Buffalo, to recover the amount of the award. That court held that when the report of the commissioners was duly confirmed by the common council of the city, the right of the owners of the land sought to be taken, to the compensation awarded, became fixed, and the common council as to time had no discretion left to be exercised by it. [Upon this point the counsel for plaintiffs, on the appeal in this court, cited Hawkins *v.* Trustees of Rochester, 1 *Wend.* 63. In the matter of Dover-street, 18 *Johns.* 506. Stafford *v.* Mayor, &c. of Albany, 6 *Id.* 1; S. C. on appeal, 7 *Id.* 541.] The superior court further held that in consideration of the grant to defendants

the neglect to exercise it, did not discharge the duty of paying the owners of the land, or extend the time for making such payment. The charter, in section 17 of title 8, provides that the amount of compensation due to the land owners shall be legally assessed, but section 18 declares, in effect, that, as between such owners and the city, the compensation shall be a general debt or charge. This is the effect, because the money is payable peremptorily within the time specified, and out of no particular fund.

The second ground of nonsuit urged was that the plaintiffs' remedy was by a mandamus to compel the common council of the defendant to proceed and make the contemplated assessment, and out of the fund thus received, to pay and discharge the award made to the testator. A like ground was taken in the case of Warren, *supra*, and it was then thus answered by this court: "It has been also said that the remedy of the plaintiffs is by mandamus, and not by suit. Undoubtedly if the sum in controversy was payable only out of the local assessment fund, a madamus would lie to compel that assessment to be made, and an action probably would not lie until the money should be collected on the warrant. But the plaintiffs have nothing to do with the local tax. The duty owing to them is simply the payment of a sum of money, and the action

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of the right of eminent domain, with ample power to ascertain the *compensation* to be made under the constitution, and to assess and collect the moneys required to pay it, the defendants contracted with the sovereign power to pay to the owner of the land taken the just compensation awarded him, within one year after the confirmation of the report of the commissioners. And that this agreement inured to the benefit of whoever was entitled to compensation, so that he could maintain an action for its breach. Citing Weet *v.* Trustees of Brockport, 16 *N. Y.* 161; Stafford *v.* Mayor, &c. of Albany, 6 *Johns.* 1; 7 *Id.* 541.

Upon judgment entered for plaintiffs being affirmed, at general term, defendants appealed.

George Wadsworth, for defendants, appellants.

A. P. Nichols, for plaintiffs, respondents.

This court affirmed the judgment. The grounds of its decision appear in the case in the text.

of debt was always the appropriate remedy for the enforcement of such a duty."

It is urged by the respondent's counsel, that there is no proof in the record or otherwise, that one of the city assessors was appointed one of the commissioners, in accordance with the directions of the city charter, and again he urges that the provision of the charter requiring the appointment of one of the city assessors on the commission is unconstitutional. In support of this latter position, he argues that the constitution provides that the compensation to be paid for land taken for public use shall be ascertained by a jury or by three commissioners appointed by a court of record. That it was intended to give parties the right to go before an unbiased court and submit their objections to any person proposed, and to secure the appointment of fair and disinterested appraisers. That the legislature has no right, therefore, to direct that any particular individual shall be appointed, and thus usurp the powers given to the court. In this view of the constitutional provision, the counsel for the respondents is undoubtedly correct. The legislature clearly had no power to say who, or what class of persons, should be appointed commissioners. In the matter of the opening of the Eleventh-avenue, Judge EDWARDS, at special term, in 1852, held that this provision superseded the requirements of the act of 1839, which directed the court to appoint one commissioner on the nomination of the common council of New York, and one on the nomination of the parties whose property was to be taken, and the third to be selected by the court; that the Constitution vested in the court, absolutely and without control, the appointment of the commissioners, and that the court had full power to select such commissioners as in its judgment were most fit, without reference to the nominations of the common council, or the parties in interest. Such had been the ruling of the court in other cases, and that is regarded as the settled practice in the appointment of commissioners in the first judicial district. *Davies' Laws*, p. 1244. It may be conceded, therefore, that the provision in the defendant's charter requiring the court to appoint one of the city assessors as one of the commissioners, is repugnant to the Constitution, and, therefore, void and of no obligatory force upon the court;

yet still it is not perceived how this objection can be availed of, or is at all appropriate, if the position of the counsel is true, that there is no proof in the record or otherwise that one of the city assessors was appointed one of the commissioners. If the provision of the charter requiring one of the assessors to be appointed was unconstitutional and void, surely the proceedings are not invalidated by the omission to prove that such illegal and void appointment was made. The averment in the complaint that one of the commissioners was a member of the board of assessors, was denied by the answer, and no proof was offered to sustain the averment, and there was no finding on the subject. But if the averment is to be taken as a fact, it is not perceived how it renders the appointment of this particular commissioner invalid. There is no prohibition in the constitution against the appointment of one of the city assessors; and, upon the argument of the defendant's counsel, sustained by abundant authority, it is manifest that the discretion of the court as to whom it should appoint commissioners could only be restrained or qualified by a constitutional limitation. It follows, therefore, that if the court in its discretion thought proper to appoint one of the city assessors a commissioner, it would have been perfectly legal and proper so to have done. By the charter of the defendant as it existed at the time this award was made and confirmed, it was made the duty of the defendant absolutely to pay the same within one year after the amount was ascertained. This ascertainment could only be definitely determined when the report of the commissioners should be confirmed. The amount, then, was to be paid within one year after the confirmation of the report. A similar provision exists in the laws relating to the taking of property for public use in the city of New York. There the functions of ascertaining the amount of compensation to be made to the respective owners of the lands taken, and the assessment of the total amount so ascertained, together with the costs and expenses of the proceedings, are united in one set of commissioners; and they as well make the awards, as make and impose the assessments. Upon the confirmation of their report the awards are ascertained and a fund provided for their payment. The statute also declares that the corporation of that city shall pay,

within four calendar months after the confirmation of the report, the amount of such awards respectively, and in case of neglect shall be liable in an action to pay the same, with lawful interest from the time of such demand, with costs of suit. It has never been questioned there that such liability was absolute upon the corporation at the expiration of the four months from the confirmation of the commissioners' report, and that it was no answer to the demand or to the action that the assessment made had not been collected.

The liability of these defendants, therefore, is clearly the same as that of the corporation of the city of New York, and is absolute, after the expiration of the times respectively specified for the payment of the awards. As this case is clearly distinguishable from the case of McCullough *v.* Mayor, &c. of Brooklyn, 23 *Wend.* 458; and Gerald *v.* City of Brooklyn, decided in this court at June term, 1863.* Both these cases were actions to recover awards made for lands taken for public use, and the charter of the defendants required an assessment to be made for the payment of the awards. But the sums awarded for damages were not declared to be debts against the city, nor was it made the duty of the corporation to pay the money. It was held in those cases that the only duty or obligation resting upon that corporation was that of putting the necessary machinery in motion according to the requirements of the statute. It was said that if the common council had neglected that duty,

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* GERALD *v.* CITY OF BROOKLYN, was an action brought by Hannah Gerald, executrix, &c., and others, in the supreme court, against the city of Brooklyn, to recover the amount due upon an award to plaintiffs' testator, reported by the commissioners and confirmed by the county court of Kings county, for lands appropriated by defendant for a public improvement.

On the trial plaintiffs' counsel asked the court to rule, "that in and by the confirmation of the commissioners' report, the liability of the city for the payment of the award became determined and fixed, and bound the city to pay the same from that date," which the court refused; but ruled that "if the city was liable, it would be only for neglect and want of due diligence in collecting the assessment for said improvement, and the plaintiffs would then be entitled to interest only from the time of the demand of the award."

There being no proof of neglect on the part of the city to take the ne-

or had been wanting in diligence, an action on the case might lie in favor of any one who, like the plaintiff, would be entitled to the money when collected. But it was suggested that a *mandamus* would be a more appropriate remedy.

By an amendment to the charter of the present defendant, made in 1859, the moneys payable by the city for awards of lands taken, instead of being payable within one year after the *ascertainment* of the amount thereof, were thereafter payable within one year after the assessments to be made for the payment thereof. The right of the plaintiffs' testator to this money, and to compel its payment by defendant, was vested and complete at the expiration of a year from the ascertainment of the amount. The section of the defendant's charter was not repealed, and, therefore, the reasoning of COWEN, J., in Butler *v.* Palmer, 1 *Hill*, 324, is inapplicable in this instance. It may well be held that the amendment of 1859 applied only to awards made after the passage of that act. It did not in terms apply to those made and ascertained previous to its passage, and therefore should not have that effect. An act of the legislature, as a general rule, is to have no retrospective operation, and BLACKSTONE, in his commentaries, treats it as a just principle that all laws are to commence *in futuro* and operate prospectively. 1 *Blacks. Com.* 44.

In Dash *v.* Van Kleeck, 7 *Johns.* 477, it was held, after much deliberation and an extended discussion, that an act of the legislature is not to be construed to operate *retrospectively*,

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cessary steps for the collection of the assessment, the complaint was dismissed.

The judgment entered accordingly was affirmed at general term; where the primary and general liability of the city was repudiated and denied upon the authority of the following cases: McCullough *v.* Mayor, &c. of Brooklyn, 22 *Wend.* 458; Lake *v.* Trustees of Williamsburgh, 4 *Den.* 520; Hunt *v.* City of Utica, 18 *N. Y.* 442. Plaintiffs appealed.

The cause was submitted in this court.

L. I. Lansing, for plaintiffs, appellants.

John G. Schumaker, for defendant, respondent.

THIS COURT affirmed the judgment on the grounds above stated.

so as to take away a vested right, and that it was a principle of universal jurisprudence, that laws, civil or criminal, must be prospective, and cannot have a retroactive effect. The language of Judge THOMPSON, in that case, is pertinent to that now under consideration. He said: "Giving to the act a retrospective operation would manifestly be productive of wrong and injustice, for it not only takes away a vested right, but punishes and endamages the plaintiff, in the payment of costs. . . . . It can never be presumed from the general words of this statute, that the legislature intended that it should work such injustice. Nothing short of the most direct and unequivocal expressions would justify such a conclusion. The best settled rule of construction given by the English courts to the statute of frauds (29 *Car. II.* c. 3) goes strongly in corroboration of the interpretation I have given to the act before us. The language of that statute is, 'that from and after June 24, 1677, *no action shall be brought* whereby to charge any person upon an agreement in consideration, &c.' Yet it has been uniformly held that the act would not retrospect so as to take away a right of action to which a party was before that time entitled, but applied only to promises made after June 24, 1677. 4 *Burr.* 2360; 2 *Show.* 17; 3 *Mod.* 310; 1 *Vent.* 330."

It must, therefore, be held that the amendment of 1859 did not take away the right of action of the plaintiff's testator, which was vested and complete before that amendment was made.

It is further contended, that the whole proceedings of the common council of the defendant were void for want of authority, in this, that there was no application of a majority of the property holders, resident of the city of Buffalo, and liable to be taxed or assessed for the proposed ship canal, to the common council, for the construction thereof, or the taking and appropriating of the land necessary to lay out the same; and that without such application the common council had no power or authority to take the said land or proceed in the construction of the said canal. The provisions of section 19 of the defendant's charter, requiring an application of a majority of the property holders, apply only to the improvements mentioned and enumerated in that section. They are the grading,

building, paving, repairing, macadamizing or graveling any street, alley, lane or highway in said city, or the construction, relaying or repairing, any cross and sidewalks, drains, basins, canals, docks, slips, wharves, sewers and acqueducts therein. It is thus seen that these provisions contain no limitation upon the powers of the common council to take and appropriate the necessary land, which may be required for the laying out, widening, altering or straightening any street, alley, lane, highway, market ground, public ground, canal, basin, wharf or slip, conferred by section 6 of title 8. The two proceedings are entirely independent of, and unconnected with each other, and that authorized by section 6 can be initiated on the mere motion of the common council, while the improvements called for by section 19 must have for their basis an application from a majority of the property holders directly interested therein and resident of the city.* There is no force, therefore, in the objection that the resolution to take the lands of the testator of the plaintiffs and others, for the construction of the ship canal, was void, because not asked for by a majority of property holders interested therein. It may well be that the common council could not proceed to construct said ship canal without such application, but I have no doubt such application was not called for, or required, before they could determine to tal the land for that purpose.

The judgment should, therefore, be affirmed.

A majority of the judges concurred.

Judgment affirmed, with costs.

GARDINER *v.* TYLER.

September, 1867.

The settled rule of the courts to allow to trustees only the same commissions as the statute allows to executors and guardians for similar services, is not applicable to receivers appointed by the court in actions

* See, for the application of this rule, the cases of Hatch v. City of Buffalo, 38 *N. Y.* 276; and Allen v. The same, *Id.* 280.

pending therein. *So held*, of a receiver appointed to receive and apply rents, pending a controversy arising on the probate of a will.

The court by whom a receiver is appointed has power to determine the rate of his compensation, and it may be fixed with reference to the circumstances of the case.

David L. Gardiner brought this action against Julia G. Tyler and Harry Beeckman. The facts are stated in the opinion of the court. The cause came up upon appeals involving the question of the receiver's right to commissions and disbursements.

W. Watson, for plaintiff, appellant;—Cited N. Y. & N. H. R. R. Co. *v.* Schuyler, 34 *N. Y.* 33; Estus *v.* Baldwin, 9 *How. Pr.* 80; Lovett *v.* German Ch., 12 *Barb.* 67; *Code*, § 330; 8 *Coke*, 142, *b*; Drury's Case; King *v.* Harris, 34 *N. Y.* 336; How. *v.* Davis, 4 *Abb. Pr.* 71; *In re* Bank Niagara, 6 *Paige*, 213; *Edw. on Receivers*, 642; 7 *Paige*, 276; *In re* Roberts, 3 *Johns. Ch.* 43.

J. Buchanan Henry, attorney for defendant, respondent;—Cited 3 *R. S.* p. 767; *Code*, § 244; 1 *R. S.* p. 46, § 29; Brower *v.* Brower, 2 *Edw.* 621.

J. M. PARKER, J.—This is an appeal from two orders of the supreme court, made under the following circumstances:

The action was brought for the appointment of a receiver of the rents of the estate of Juliana Gardiner, deceased, pending a contest before the surrogate of Richmond county, respecting the validity of her alleged will, the probate of which was being contested by the plaintiff; and James I. Roosevelt was appointed such receiver, and qualified as such.

The surrogate having decided against the validity of the will, and refused to admit it to probate, an appeal was taken to the supreme court, and the general term, in the second district, reversed the decree of the surrogate, and sent the case back, with the direction that the will be admitted to probate, which was accordingly done.

At this stage in the proceedings, a motion was made in this suit, by the defendants, to dismiss the complaint, for unreasonable neglect of the plaintiff to proceed in the action, where-

upon it was, on June 2, 1866, ordered as follows: "That the complaint in the above entitled action be, and the same is, hereby dismissed with costs; and that all orders heretofore granted as provisional remedies herein, are vacated and set aside." No further judgment appears to have been entered in the action.

After the above order was made, and on November 27, 1866, an order was obtained, whereby the receiver was directed to pass his accounts before a referee named, and to pay over and apply what the referee should certify to be due from him as receiver, to the satisfaction and payment of the unpaid taxes which were due and a lien upon the real estate of the said Juliana Gardiner, deceased, situate in the city of New York, prior to her decease; and that he transfer and deliver to the defendant, Julia G. Tyler, all deeds, leases and property, which may have come into his possession, as such receiver. This order, it appeared by affidavits on the part of the defendants, was entered by consent of the plaintiff given in open court, though not so stated in the order.

The referee therein named proceeded to take the account, and made a report, whereby he certified, as remaining in the hands of the receiver, the sum of three thousand four hundred and sixteen dollars and seventy-two cents, to be applied to the payment of taxes as directed by said order. In the statement of the account, as allowed, are several items of credit by the receiver to the estate, of rent from G. Bradley, of which the following is a specimen: "By cash, from G. Bradley, for rent, $1,030;" and among the items allowed to the receiver are the following: "To cash paid, sundry taxable costs, charges and disbursements, including attorney's fees, etc., in five foreclosure suits, $125; commissions on $13,175.93, at five *per cent.*, $658.79."

The plaintiff excepted to the allowance of the five *per cent.* commissions upon the whole amount of the moneys received and paid out. Also to the allowance of the one hundred and twenty-five dollars, costs and attorney's fees in five foreclosure suits, and claimed that disbursements only should have been allowed. Also, that the referee has reported the sums received for rents from G. Bradley, when he should have reported the

sums received from tenants, instead of the sums received for rents, diminished by the charges of said Bradley.

These exceptions were heard before the court, at special term, on January 17, 1867, and were all overruled, except that the one as to the receiver's commissions is so far allowed that the one-third of said commissions, allowed over and above the sum of two hundred and fifty-one dollars and seventy-five cents (to wit, one hundred and thirty-five dollars), was deducted from the commissions charged, and added to the balance certified by the referee as in the hands of the receiver; and the report was, in all other respects, confirmed. From this order of the special term, an appeal was taken to the general term, and the order was, on April 18, 1867, affirmed. This order of affirmance is one of the orders from which the plaintiff has appealed to this court.

In the controversy respecting the will, the judgment of the supreme court, reversing the decision of the surrogate, was, on appeal to this court, on January 2, 1867, reversed; and, thereupon, the plaintiff in this action moved the supreme court, at special term, on March 15, 1867, for an order modifying the order of November 27, 1866, so as to direct the receiver to pay the balance in his hands to this plaintiff, instead of paying the same upon the taxes in said former order specified. This motion was denied; and, from the order denying it, the plaintiff appealed to the general term, where the order was affirmed. This order of affirmance is the other order brought here by the appeal.

The appeal from the first mentioned order brings up for review the exceptions to the referee's report, upon the accounting of the receiver. The exception stating "that the referee has reported the sums received for rents from G. Bradley, when he should have reported the sums received from tenants, instead of the sums received for rents diminished by the charges of said Bradley," is not founded upon any fact which appears from the papers before us. The statement in the account, "by cash from G. Bradley, for rent," is the only statement of fact upon the subject; and the legitimate inference from this is, that Bradley was the tenant, and not the middleman implied

in the exception. This exception was, therefore, properly overruled.

In regard to the allowance of the charge in the receiver's account, of one hundred and twenty-five dollars, for taxable costs, in five foreclosure suits, the exception, claiming it to be erroneous, on the ground that disbursements only should have been allowed, assumes that the receiver acted as attorney in those suits, and was claiming the costs and attorney's fees for himself as such attorney. There is nothing to show that such was the fact; but the inference is, from the terms of the charge, that he paid that amount to some other attorney for his services as such in the suits. It is not necessary, therefore, to examine the question whether the charge contains anything which the receiver could not properly charge if he performed the services himself as an attorney of the court. This exception was also properly overruled.

The five per cent. allowed by the referee, as commissions upon the amount received and paid out by the receiver, was not all allowed by the court; and yet the appellant complains that it was not reduced to the rate allowed to executors and administrators, which he insists is the legal rate in cases of this kind also. The statute does not fix the compensation to be allowed to receivers, appointed under section 244 of the Code, as this one must have been; except that it is provided in said section (subd. 4), that receivers of the property within this State of foreign corporations shall be allowed the same commissions as are allowed by law to the trustees of the estates of absconding, concealed and non-resident debtors, which is five per cent. upon the whole sum which shall have come into their hands. 2 *R. S.* 1 ed. § 31. Although, in regard to the compensation of trustees, in the absence of any statutory provision therefor, it has come to be the settled rule of the courts to allow only the same commissions as the statute allows to executors and guardians for similar services, I do not think the rule applicable to receivers appointed by the court, in cases pending therein. "A receiver is an officer of the court; and, as such, in the absence of legislation, the court has the authority to determine his compensation." Magee *v.* Cowperthwaite, 10 *Ala.* 966; *Edw. on Rec.* 642. Such is the established rule of the court of

chancery in England, where the amount of compensation, or salary, as it is called, allowed to a receiver, is often left to the master, to fix with reference to the trouble and labor of the case. Day *v.* Croft, 2 *Beav.* 488; Potts *v.* Leighton, 15 *Ves.* 273. I do not find that the right of the court to fix the receiver's compensation, where the statute has not done so, is denied by any case in this State; nor do I find that the rate of compensation fixed by the statute for executors and guardians has, by the courts, been applied to receivers. The course of legislation on the subject indicates, I think, that such rate does not apply; for the legislature has limited the compensation of receivers, in the case of moneyed institutions, to the rate allowed by law to executors and administrators. *L.* 1842, c. 3. If that rule applied before, this was unnecessary; and the application of it to that class of receivers alone implies that it is not to apply to any other class. If the supreme court, which appointed the receiver in this case, had authority to determine the rate of his compensation, as I think it had, there is no error in its exercise, and no error in the order now under consideration.

In regard to the other order, I can discover, from the papers before us, no good reason why it should be reversed. The order of November 27, 1866, which the plaintiff sought to modify, directed the receiver to pay over and apply the moneys in his hands upon unpaid taxes which were due and a lien upon the real estate of the said Juliana Gardiner, situate in the city of New York, prior to her decease; and this direction was made by consent of the plaintiff. Now the plaintiff asks the court to modify that order, and direct those moneys to be paid over to him; and such would be the effect of a reversal of the order appealed from. The parties to this action are the heirs at law of the said Juliana Gardiner, deceased; and no facts are shown why the plaintiff, one of them, is entitled to these rents and profits, nor why the application of them to the arrears of taxes, to which the order of November 27 devotes them, is not a perfectly equitable disposition of them, with reference to the rights of all parties. Moreover, it is shown, by the affidavits on the part of the defendants, that another action is pending in the supreme court, involving the question of the plaintiff's right

to them. Under such circumstances, the supreme court was right in refusing to modify the order, as moved for by the plaintiff.

The order appealed from should be affirmed, with ten dollars costs.

All the judges concurred.

Orders affirmed, with costs.

GENTER *v.* FIELDS.

December, 1864.

Upon appeal from a single judge of a court to the general term, security is not required except where it is desired to effect a stay of proceedings (*Code of Pro.* § 327); and under section 348,—which provides that such security must be renewed when required, as in case of an appeal to the court of appeals,—neglect to comply with an order to renew only terminates the stay, and does not affect the appeal.

An order of the court below, dismissing the appeal for such neglect, is not a matter of discretion, but affects strict legal right, and is appealable to this court.

Nicholas Genter sued Seth H. Fields, sheriff of Otsego, in the supreme court, and recovered a verdict for nine hundred and eighty-five dollars and ninety-four cents, money collected, on which verdict he entered judgment. On July 25, 1857, defendant served a notice of appeal from the judgment, to the court at general term, and gave the undertaking with sureties which is required by section 348 of the Code, in order to secure a stay of proceedings pending the appeal.

On Aug. 30, 1859, the appeal being still pending, the court, upon proof that the sureties had become insolvent, granted an order requiring the defendant to execute a new undertaking, with sufficient sureties, as required by section 335 of the Code of Procedure as amended in 1859. From this order the defendant appealed to the court at general term, and they affirmed it.

The respondent, in January, 1860, applied to the court at general term, on affidavits that no new undertaking had been given,

and obtained an order dismissing the defendant's appeal from the judgment entered against him, on account of the neglect to give a new undertaking. From the order of dismissal defendant appealed to this court.

James E. Dewey, for defendant, appellant;—cited, besides cases mentioned in the opinion, Robert *v.* Donnell, 10 *Abb. Pr.* 454; Boyd *v.* Bigelow, 14 *How. Pr.* 511; Parsons *v.* Suydam, 4 *Abb. Pr.* 134.

Dewitt C. Bates, for plaintiff, respondent.

By the Court.—T. A. Johnson, J.—There can be no doubt that an appeal to the general term of the supreme court, from a judgment rendered at special term, when made according to the provisions of section 327 of the Code of Procedure, is complete and effectual as an appeal for all purposes, except the staying of the proceedings upon the judgment.

If the party appealing desires a stay of proceedings upon the judgment in such a case, he must, in addition to the service of the notices prescribed by section 327, execute to the other party the undertaking provided for by section 335 of the Code. The undertaking is no part of the appeal, which is effectual without it, but operates only to suspend all proceedings upon the judgment pending the appeal. This is the well settled practice, and is in entire harmony with the several provisions of the Code. Kitching *v.* Diehl, 40 *Barb.* 433; Niles *v.* Battershall, 26 *How. Pr.* 93; Staring *v.* Jones, 13 *Id.* 423. Many other cases might be cited, but there is no doubt as to the practice. Section 348 of the Code expressly provides that "Such an appeal, however, does not stay the proceedings unless security be given, as upon an appeal to the court of appeals, *and such security be renewed*, as in cases required by section 335, on motion to the court at special term, or unless the court or a judge thereof so order," etc.

This is different from appeals to the court of appeals, which are not effectual for any purpose unless an undertaking be executed by the appellant for the payment of all costs and damages which may be awarded against him upon the appeal, not exceeding two hundred and fifty dollars, as provided for by

section 334.* This provision has no application whatever to appeals provided for by chapter 4 of the Code, under which the appeal in question was brought, and which relates exclusively to appeals in the same court from a single judge to the general term thereof.

This chapter contains no provision for the dismissal of any appeal because an undertaking has not been executed or renewed in pursuance of an order to that effect. The only provision on the subject of an undertaking, in this chapter, is contained in section 348, already cited. If no undertaking is executed by the appellant, the judgment may be enforced the same as though no appeal had been brought, but the appeal is still effectual and to be heard. And so if an undertaking has been executed and proceedings upon the subject thereby stayed, the stay ceases and becomes inoperative, if the undertaking is not renewed in pursuance of an order of the special term requiring such renewal, and the judgment may then be enforced the same as though there had been no stay.

Neglect or refusal to comply with the order to renew the undertaking, operates upon the stay of proceedings on the judgment, and puts an end to it, but in no respect affects the appeal.

The penalty of dismissal of the appeal, in case of neglect to execute the new undertaking, in pursuance of the order prescribed by section 335, applies only to appeals to the court of appeals. It is not made applicable to any other class of appeals, either by its terms, or by the policy of the Code. In appeals of this kind the penalty for the neglect to execute such new undertaking is, that the proceedings upon the judgment are no longer stayed. This is plain from the manner in which section 348 was amended in 1859, which was by inserting, "and such security be renewed as in cases required by section 335 on motion of the court at special term." This is added as something further to be done by the appellant to affect or to continue a stay pending the appeal.

The plain object of the amendment was to remedy a defect in the section as it before stood, and to prevent or determine

* The sum was increased to five hundred dollars, by the amendment to section 334, passed in 1865.

the stay after the sureties had become insolvent, but not to affect the appeal.

The supreme court erred, therefore, in holding that the effect of a non-compliance with their order to renew the security, was to vitiate the appeal.

The dismissal was not a matter of discretion, but of strict legal right; and as the effect was to prevent a judgment from which an appeal to this court might be taken, it is an appealable order. *Code*, § 11; Bates *v.* Voorhees, 20 *N. Y.* 525. The order dismissing the appeal should therefore be reversed, with costs of the appeal.

All the judges concurred.

Order appealed from reversed, with costs.

GILBERT *v.* GILBERT.

March, 1864.

The decision in Siemon *v.* Schurck (29 *N. Y.* 589, affirming 33 *Barb.* 9), —that if lands are purchased for the benefit of a minor, with money given by parents, and the deed, taken in the name of a third person, is made absolute in form without the knowledge of the minor or parents, a valid trust results in favor of the minor, notwithstanding the abolition of resulting trusts by the Revised Statutes—reasserted, and followed in a case where the absolute character of the deed was known to the parent.

Cashton R. and Erseba Gilbert, by I. V. Matthews, their guardian *ad litem*, brought this action against William Gilbert, in the supreme court, for the specific performance of an agreement between defendant and William Gilbert, Sr., deceased, the father of the plaintiffs.

The father of the plaintiffs, in his lifetime, had contracted with one Winter, for the purchase of land from Winter, and the latter had given his bond to convey. Mr. Gilbert subsequently agreed by parol, with his son, the present defendant, to provide him (the son) with the purchase money, let him pay Winter, and take a conveyance in his own name; the son

agreeing to let the father have the use of the land for life, and at his death to convey it to the other children, the plaintiffs in this action. One object of this arrangement was to prevent the wife and mother from acquiring a right of dower. In pursuance of the agreement, defendant received and paid over the price, took a deed to himself, and gave his father a lease for life, at an annual rent of sixty dollars. He, however, permitted his father to occupy for life without payment of rent.

The referee found these facts, and concluded, as matter of law, that the agreement to convey to the children (the plaintiffs) though void at law, could be enforced, in equity, as an agreement partly performed.

The supreme court reversed the judgment entered on the referee's report, they holding that the trust was precisely such as was prohibited by the statute; that the important object of the statute was to prevent the real owners of land being deprived of title by perjury, and that the statute must be deemed to make a parol agreement, designed to establish a beneficial interest in land in opposition to the legal title, void, not only as towards the parties, but as to all the world. They conceded that had defendant owned the land, and agreed to convey a life estate to the father and remainder to the children, the agreement, after part performance, might have been enforced; but the father having first contracted for the purchase of the land, it was an attempt on his part to create a trust by parol. They accordingly ordered a new trial. Plaintiffs appealed.

Charles Henshaw, for plaintiffs, appellants.

L. W. Thayer, for defendant, respondent.

THIS COURT held, that, for the reasons stated in Siemon *v.* Schurck, above referred to, the order of the general term should be reversed.

INGRAHAM, J., dissented, and concurred with the supreme court,—citing Garfield *v.* Hatmaker, 15 *N. Y.* 475, and expressing the opinion that the statute vested the title in the alienee.

Order reversed and judgment on report of referee affirmed, with costs.

GOODWIN *v.* NELIN.

December, 1867.

A purchaser of land, in possession under an executory contract, died, leaving his heir in possession; and after the purchase money fell due and was unpaid, the vendor rescinded the contract, and recovered judgment in ejectment against the heir, and then conveyed the premises to the heir. *Held*, that the heir acquired complete title; and that the land could not be reached by proceedings in the surrogate's court for its sale for payment of the debts of the deceased purchaser,

Even if the heir obtained the conveyance by fulfilling the contract of the deceased, the land cannot be reached without an offer, on the part of the administrator or the purchaser at the administrator's sale, to perform, and a tender of the amount due.

Jonathan Goodwin brought this action against Mary Nelin, to recover possession of lands. On plaintiff's death his claim passed by devise to, and the action was continued by Calvin Goodwin.

The lands in question formerly belonged to one Bristol, who contracted to sell them to Francis Hunt. Hunt took possession under the contract, and died before having paid up the purchase money. On his death, Mary Nelin, the defendant, his heir, was left in possession.

The administrator proceeded under the statute (2 *R. S.* 100, &c.), to have the decedent's interest in the lands sold for payment of his debts. Mary Nelin appeared before the surrogate in these proceedings, and a sale was ordered subject to payments to become due on the contract. Jonathan Goodwin became the purchaser at the sale. Meanwhile, however, Bristol, the vendor, had declared the contract forfeited for non-payment of the purchase money, and brought ejectment against the heir, in which he recovered judgment. The heir then obtained a conveyance from him; and now being sued for possession, by the purchaser at the administrator's sale, set up that she had purchased of the vendor, by a new contract made after the judgment in ejectment.

The complaint alleged fraud on the part of the heir, and demanded a surrender of the contract, and possession of the land, and an accounting as to payments, rents and profits. The answer denied this fraud and charged fraud in the administrator's sale, and denied the legality of the proceedings.

On the trial the defendant put in evidence the judgment roll in the ejectment suit, to which plaintiff objected, but the the court held that it was a defense unless shown to be fraudulent. In consequence of the admission of this judgment, plaintiff's offer to prove that defendant had stated that she had paid Bristol all that was due on the contract and that Goodwin was a creditor, and that the administratrix had conveyed to him, was excluded by the court, and the court dismissed the complaint. To each of these rulings plaintiff excepted.

The findings of the judge, upon which the decision in this court was based, were in substance as follows:

That in or before the year 1850, Hunt had contracted to purchase the land in question from Bristol, for five hundred dollars, part of which was paid, and the residue was to be paid in annual installments, and a deed to be given on full payment. The contract, by its terms, was to become void on failure to pay according to its terms. Hunt took possession under it. The purchase money all became due before September 20, 1852, when two hundred dollars remained unpaid, which sum had not been paid or tendered to Bristol or any one else. Hunt died December 16, 1851, intestate, leaving defendants in possession; an administratrix was appointed in 1853, and on her application, the surrogate, on February 6, 1854, ordered her to sell Hunt's interest in the contract subject to all payments thereafter to become due. That the bond required by law before ordering a sale was given after the order and as of date of the order, but before the sale. On September 30, 1854, the sale was made to Goodwin for two hundred and fifty dollars, and confirmed October 9, 1854.

Meanwhile, however, on September 20, 1852, Bristol declared the contract void for the default in payment of purchase money, and brought ejectment against the present defendants, in which, on October 30, 1852, he recovered judgment for possession of the premises and costs.

Finally, the judge found that on June 15, 1853, Bristol sold and conveyed the lot to Mary Nelin. Whether this purchase was in fulfillment of the original contract, as alleged by plaintiff, or in pursuance of a new contract, as alleged by defendants, he did not find.

The supreme court held that the recovery in ejectment was a defense to this action; and dismissed the complaint. Plaintiff appealed.

William Tiffany, for plaintiff, appellant.—That the judgment in ejectment was not evidence against plaintiff in this action,—cited, Ryerss *v.* Rippey, 25 *Wend.* 432; Van Bokkelin *v.* Ingersoll, 5 *Id.* 315; Osgood *v.* Manhattan Co., 3 *Cow.* 612; Jackson *v.* Robinson, 4 *Wend.* 436. That were it evidence, it would not bar this suit in equity for specific performance. Leggett *v.* Edwards, *Hopk.* 530; Spencer *v.* Tobey, 22 *Barb.* 260. And receiving part payment from the heir was a waiver. Harris *v.* Troup, 8 *Paige*, 423. That the judgment should have been interposed in the surrogate's court. *L.* 1850, c. 82, § 1; Jackson *v.* Robinson, 4 *Wend.* 440; Jackson *v.* Hoffman, 9 *Cow.* 272. That the creditor had a lien, enforceable by this proceeding. *Story Eq.* 1216; Morris *v.* Mowatt, 2 *Paige*, 586; *L.* 1850, c. 82; Thompson *v.* Brown, 4 *Johns. Ch.* 619; Parsons *v.* Bowne, 7 *Paige*, 354; Butts *v.* Genung, 5 *Id.* 254. The heir could not thus use her possession to defraud the creditors. Van Horne *v.* Fonda, 5 *Johns. Ch.* 388; Burhans *v.* Van Zandt, *Clint. Dig.* 3137–8; reversing 7 *Barb.* 91; Phelan *v.* Kelley, 25 *Wend.* 389; *Roberts on Frauds*, 589. That the want of tender was no defense; it was the surrogate's duty to pay the purchase money (3 *R. S.* 200, § 86), and defendant was estopped.

D. H. Marsh, for defendants, respondents.

By the Court.—Davies, Ch. J.—These exceptions [referring to those above stated] present the only question for the consideration of this court.

Upon the facts found by the court, it is very clear that the

plaintiff had no standing in court to impeach the title of the defendant, Mary Nelin, to the lot in question. He certainly had no greater rights than were possessed by his grantor, the administratrix of Francis Hunt. If it be true, as found by the court, that the contract, by its terms, had terminated, and Bristol had the right to declare it forfeited and terminated, as it is found he did, and proceeded to enforce his rights upon that basis, and did recover the possession of said premises, it is not seen why he had not a perfect right to sell the said premises to whomsoever he pleased; and why the defendant could not purchase the same, and acquire a perfect title thereto. Upon these facts, no title or interest remained in the estate of Francis Hunt, at the time of the initiation of the proceedings in the surrogate's court, to sell his real estate or his interest in the said contract of purchase. By the terms of the contract, that interest had terminated on September 20, 1852; and on that day, Bristol, by the act of commencement of the action of ejectment, elected so to regard it, and on October 30, succeeding, obtained judgment in said action, and was therefore entitled to the possession of said premises. It is not pretended that said recovery was fraudulent or collusive.

On June 15, 1853, Bristol, then the owner of said premises, sold and conveyed the same to the defendant, Mary Nelin, for a valuable consideration; and this action is in the nature of an ejectment to recover such possession. It cannot be be maintained, for the very obvious reason that the plaintiff has shown no title to the premises claimed. He cannot recover upon the weakness of the defendant's title, but upon the strength of his own. The title of the plaintiff was acquired more than a year after the defendant had received a deed for the premises in dispute from the conceded true owner thereof, and when she was in possession of said premises and holding the same, adversely to any title the plaintiff had, or could have, from the representatives of Francis Hunt. If he had survived, he could not have set up any title to said premises until he had performed, or offered to perform, said contract, on his part. This, neither the plaintiff nor those from whom he derived title had ever done. If they had any right, or had acquired any under such contract, it could not be asserted or enforced, unless it was

made to appear that they, or those under whom they claim, had performed the same, or had offered to perform, on their part. They were clearly not entitled to a deed from Bristol until this was done. And as the court had found as a fact that the money due upon this contract was never paid to Bristol, or tendered to him or any one else, it is very apparent that the plaintiff, or those under whom he claims, never had or were entitled to have, a title to said premises.

If we assume that the defendant succeeded to all the duties and responsibilities imposed by the contract upon Bristol, and that the plaintiff has possessed himself of all the rights of Hunt under the contract, how then stands the plaintiff's right to maintain this action? It cannot be contended, as has already been observed, that he has any greater or other rights under the contract than Hunt would have had, if living. Before he or his assignor could have obtained title to the premises in question, by virtue of this contract, it was a prerequisite on his part that there should have been performance by him, or an offer to perform, and payment of the amount due, or tender of such payment. None of these things were done; and the court has found the fact that the moneys due upon the contract were never paid or tendered to Bristol, or to any one else. This latter branch of the finding is sufficiently comprehensive to include the defendant. We thus see that the plaintiff, and those under whom he claims, never had the title to said premises, and never were entitled, either legally or equitably, to such title.

It follows, from these views, that the court properly dismissed the complaint, and gave judgment for the defendant, and that the exception to such decision is untenable.

It is unnecessary, in this aspect of the case, to consider the exceptions taken to the admission and rejection of the testimony offered. The exclusion of that offered, and the admission of that objected to, would not have improved the plaintiff's case, and therefore, these rulings worked no injury to him. Without intimating any doubt as to the correctness of the rulings made, it is only needful to add that the decision of the case does not call for any expression of opinion in regard to them.

The judgment should be affirmed, with costs.

All the judges concurred, except HUNT, J., not voting, and BOCKES, J., who was absent.

Judgment affirmed, with costs.

GRAHAM *v.* CHRYSTAL.

December, 1865.

Affirming 1 *Abb. Pr. N. S.* 121.

A witness who merely thinks he could give the substance, perhaps, of a lost document, is not competent to prove its contents.*

Persons who have known nothing of a witness for eight or ten years prior to the trial, are nevertheless competent to impeach him by testifying that in former years his character was bad, and by testifying they would not believe him under oath; for no certain limit in point of duration can be laid down for such inquiries.†

On a claim for services, interest may be allowed without proof of a demand, when the debtor, by leaving the State, and having no fixed abode, prevented the creditor from making a demand.

A general exception to the conclusions of a referee does not enable the appellant to object to the erroneous allowance of interest. There should be a specific exception.

De Witt C. Graham and James S. Carpenter, executors, &c., of David Graham, deceased, sued Peter Chrystal, in the supreme court, for professional services as an attorney and counsellor-at-law, rendered for the defendant by the testator, at various times between October, 1845, and June, 1850. On the trial before a referee, the defendant gave some evidence tending to show that two hundred and fifty dollars had been received by Mr. Graham in his lifetime, in full satisfaction of his claim for the services rendered; and being examined in his own behalf, the defendant testified that he had received from Mr. Graham certain letters relating to moneyed transactions, and that he had looked among his papers and could not find them. When asked

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* Compare Martin *v.* Cope, reported in this series.

† Otherwise, it seems, of the lapse of twenty-five years. Lake *v.* People 1 *Park. Cr.* 495.

whether he could state the contents of them, he answered, "No, I could not state the precise words, but think I could give the substance, perhaps." When asked by his counsel to state the substance, objection was made and sustained, and exceptions taken.

The referee found that the services were rendered, and were reasonably worth one thousand two hundred and fifty dollars, from which two hundred and fifty dollars should be deducted as having been paid on account; that the plaintiffs were entitled to one thousand dollars, and interest; but having by their summons and complaint demanded judgment for only eight hundred and fifty dollars, he ordered judgment for that amount.

The defendant excepted generally "to each and every conclusion of law in the referee's report."

The judgment was affirmed by the court at general term, (1 *Abb. Pr. N. S.* 121,) and defendant appealed to this court.

John E. Burrill, for defendant, appellant.

Carpentier & Beach, for plaintiffs, respondents.

CAMPBELL, J. [After stating the facts.]—The writer of the letters had been dead for many years at the time of the trial, and the action was by his executors, and it is in my mind very doubtful whether the defendant, testifying in his own behalf, even if the preliminary proof of loss had been made out to the satisfaction of the referee, should have been permitted to give the substance of a written, any more than that of a verbal communication to him. In either case the testator could not be present to contradict, to vary or explain. But the referee was not satisfied with the evidence of the loss of the letters, and of the sufficiency of this evidence he was to determine. Jackson *v.* Frier, 16 *Johns.* 193. But it was eminently right that the objection should be sustained, on the ground, apparent from the answer of the defendant, that his recollection was too vague and shadowy. He thought that he might, perhaps, state the substance. It would hardly be safe to allow the contents of a lost written instrument to be proved by such a witness. I

think the objection was well taken. The defendant called two witnesses, Sittler and Porter, whom the plaintiffs sought to impeach. The impeaching witnesses had known these men, Sitler and Porter, in former years, and testified that their characters were bad, and, though they knew nothing of them for eight or ten years prior to the trial, were allowed further to testify that they would not believe them under oath. The ruling was right, and the evidence properly admitted. If not the most satisfactory, it was still competent. Sleeper *v.* Van Middlesworth, 4 *Den.* 431. In that case the inquiry was as to reputation four years previous, and it was truly said that no certain limit in point of duration could be laid down for such inquiries. If it is shown by the impeaching party that the character of the witness at a former period of his life had been bad, and thus a presumption is raised that it had continued, it is in the power of the party thus sought to be impeached, to show, as he did by witnesses in this case, that his present character is good, and thus repel the presumption.

The defendant now contends that interest should only be allowed from the commencement of the suit, whereas the referee allowed interest from June, 1850, the time when the last professional services were rendered. On principle, there is no good reason why interest should not be allowed as claimed by plaintiff and found by referee. When the services were rendered they were worth the sum which the referee found as their value, and such sum was then due, and if not paid by reason of the inability or unwillingness to pay on the part of the defendant, and such payment was deferred or delayed for several years, then full compensation or payment is only made when interest is added to such principal sum. But this case falls within the exception to the general rule as determined in McMahon *v.* New York & Erie R. R. Co., 20 *N. Y.* 463. The defendant, before the services were ended, and while the criminal proceedings were pending, left the State and remained out of it, and his residence was unknown to the testator. He took no steps to ascertain his indebtedness, and gave no opportunity for a claim to be made or presented to him. He was clearly himself in default, and cannot now complain that he is compelled to pay interest. Besides, there is no special exception

to the allowance of interest. The exception is general to all the findings, both of law and fact, except as to some enumerated ones. As was said in McMahon *v.* New York & Erie R. R. Co., *supra*, the exception, to be of avail, should have pointed out the precise objections, so that the plaintiffs might have had their election to remit the excess of interest.

There are no other exceptions that require any attention. The whole case shows that the defendant was probably saved from a long and disgraceful imprisonment by the great professional skill and perseverance of the testator in his defense, and the value of the services being abundantly proved, and found by the referee, and there being no exceptions on the trial well taken, this judgment should be affirmed.

WRIGHT, J.—[After stating the facts.]—The allowance of interest on the amount of the recovery from June 1, 1850, is now insisted on as a ground of error. Usually, interest is not recoverable when the claim is unliquidated and no bill furnished or demand made before suit brought. In this case, however, my brethren are of the opinion that the allowance was right. About June 1, 1850, the defendant left the State unknown to the plaintiffs' testator, and continued absent in some of the Southern States or California, until 1860. He left without inquiry as to the amount of the claim against him. No bill could be furnished or demand of payment made in his absence, for the testator and his representatives were ignorant of his location, he having no permanent one. In 1860, when he returned to the State, and the fact came to the knowledge of the plaintiffs that he was again in the city of New York, they forthwith demanded payment of the claim, which was refused on the ground that he had paid the testator in full for the services. The tendency of recent decisions is to relax the rigid rules that once prevailed in respect to awarding interest. Had a demand of payment been made, in this case, upon the full rendition of the services, the right to interest would have been in no way doubtful; but the defendant fled the State about that time, wandering about in other states without any fixed abode, rendering a demand impossible. Under these circumstances, the allowance of interest on the claim is but just.

But, apart from this, in my opinion, the defendant is not in a position to avail himself of the error, if it be an error to have allowed interest, for the want of a proper exception. The exceptions taken, it will be observed, are in the most general form. It is conceded that interest was allowable from the time of the demand, which preceded the suit, in 1860. The exception should have been made specific if the defendant intended to object to the time for which it was allowed. It should have stated from what time interest should have been computed, so as to have given the plaintiffs an opportunity of remitting the excess, and thus avoid the consequence of the error. But nothing of this kind was done, the defendant contenting himself with a general exception to the referee's conclusions of law that the plaintiffs were entitled to recover a gross sum, composed of principal and interest, from a stated period.

The other exceptions relate to the admission or rejection of evidence. I have examined them carefully, and have reached the conclusion that none are tenable.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

GRAY *v.* THE CITY OF BROOKLN.

September, 1869.

Affirming 50 *Barb.* 385.

Under a statute (Charter of Brooklyn, *L.* 1862, p. 203. § 39, amending *L.* 1854, p. 860, c. 384), declaring that a municipal corporation shall not be liable in damages for any nonfeasance, or misfeasance, on the part of the common council, or any officer of the city, &c., of any duty imposed on them by the charter; but the remedy of the party shall be by mandatory proceedings against the city, or by action against the officer, no action lies against the city for damages for the non-performance of an obligation imposed by the act on officers of the city.

Such act is not unconstitutional, as impairing the obligation of contracts, or as conflicting with section 3 of article VIII. of the Constitution of

the State of New York, which provides that all corporations may sue and be sued, as natural persons.

That section of the constitution was intended to confer on corporations the capacity to be sued, not to define the cases in which suits may be maintained against them.

The words "this act," in section 89 of the amendatory act (*Laws of* 1862, p 203), must be construed as referring to the charter of 1854, as amended, and not merely to the amendatory act.*

The implied contract which is deemed to arise out of the acceptance of a charter by a municipal corporation, is a contract between the city and the State, and not between the city and individuals; and is not "impaired" by a statute exempting from liability for torts.

Daniel H. Gray sued defendants, in the supreme court, to recover damages for alleged negligence on the part of the defendants in constructing a sewer, whereby his premises were flooded. The injury was sustained after the passage of the act of 1862, quoted in the opinion.

The defense interposed was the amendment to the city charter, made by that act.

The complaint was dismissed after the plaintiff's evidence was put in, and the plaintiff appealed.

The supreme court, at general term, affirmed the judgment, J. F. BARNARD, J., delivering the opinion, and holding that the act was constitutional, and a good defense. Reported in 50 *Barb.* 365.

Plaintiff appealed to this court.

Bernhard Hughes, for plaintiff, appellant.—As to defendants' duty,—cited Mills *v.* City of Brooklyn, 32 *N. Y.* 489, 499; Conrad *v.* Village of Ithaca, 16 *N. Y.* 158, 169; Rochester White Lead Co. *v.* City of Rochester, 3 *N. Y.* (3 *Comst.*) 463, 468; Storrs *v.* City of Ithaca, 17 *N. Y.* 104; Hutson *v.* Mayor, &c. of N. Y., 9 *N. Y.* (5 *Seld.*) 163; Mayor, &c. of N. Y. *v.* Furze, 3 *Hill*, 612, 615, &c.; and insisted that the act of 1862 was unconstitutional, because it applies to the city of Brooklyn only, and takes away a vested right; and it is not within the power of the legislature to exempt a municipal corporation from its legal liability, any more than it would be to exempt an individual; nor to shield one city from its legal liability for wrongs

* Compare Fire Department, &c. v. Bacon, p. 127 of this vol.

done in its corporate capacity, and to hold all other municipal corporations responsible for negligence. That the act could not be made by construction, to take away liability under the act of 1854. 1 *Kent Com.* 510, 514; People *ex rel.* Cunningham *v.* Roper, 35 *N. Y.* 629, 635; 2 *Cranch*, 290. And that the city, by accepting its charter, entered into an implied contract with the plaintiff to keep the streets in repair and indemnify him against its acts of negligence. Conrad *v.* Village of Ithaca, 16 *N. Y.* 163, and cases there cited; *Sedgw. on Cons. Law*, 625, and cases there cited; People *v.* Platt, 17 *Johns.* 195, 213, 214; 4 *Wheat.* 514; 6 *Cranch*, 144, 145; *U. S. Const.* I. § 10, subd. 11; People *ex rel.* Cunningham *v.* Roper, 35 *N. Y.* 629, 639. That the act violates the State Constitution, art. VIII. § 3. Where the remedy against others fails, the right revives. Municipal corporations are to be held to the same responsibility as natural persons, and stand, in respect to grants made to them by the State, on the same footing as would an individual upon whom like special franchise had been conferred. Bailey *v.* Mayor, &c. of N. Y., 3 *Hill*, 531; N. Y. & New Haven R. R. Co. *v.* Schuyler, 34 *N. Y.* 30; People *ex rel.* McConvill *v.* Hills, 35 *N. Y.* 449, 452. The legislature cannot, by acting on the remedy, impair the obligation of the contract. Morse *v.* Goold, 11 *N. Y.* (1 *Kern.*) 281; Bronson *v.* Kinzie, 1 *How. U. S.* 311. So long as a municipal corporation retains its corporate powers, the legislature cannot exempt it from liability. Chenango Bridge Co. *v.* Binghampton Bridge Co., 26 *How. Pr.* 126, 137.

Jesse Johnson, for the defendant, respondent.—As to the construction of the statute,—cited, Rogers *v.* Bradshaw, 20 *Johns.* 735; McCartee *v.* Orphan Society, 9 *Cow.* 437; Rexford *v.* Knight, 15 *Barb.* 627; People *v.* Aichison, 7 *How. Pr.* 241; Turnpike Co. *v.* People, 9 *Barb.* 161; *Smith's Com. on Stat. Law*, 751, §§ 736, 739; 1 *Dougl.* 30; 1 *Kent Com.* 463, 162; People *v.* Draper, 15 *N. Y.* 532; 15 *Barb.* 156; Beebee *v.* Griffing, 14 *N. Y.* (4 *Kern.*) 235; Donaldson *v.* Wood, 22 *Wend.* 395; Turnpike Co. *v.* McKean, 6 *Hill*, 616; 10 *Co.* 57; 1 *Pick.* 105; 3 *Bing.* 193; 2 *Roll.* 137; *Hob.* 93; *Dwar.* 690, 696; *Plowd.* 205; 1 *Show.* 491; *Bac. Abr.* tit. Statutes, I. 5; Sir WILLIAM

JONES, 105; Opinion in court below, 50 *Barb.* 365. As to the principle of municipal liability,—Conrad *v.* Village of Ithaca, 16 *N. Y.* 158, 163, 164; Weet *v.* Village of Brockport, and cases there cited, referred to in note to above decision; Lorillard *v.* Town of Monroe, 11 *N. Y.* (1 *Kern.*) 392; People *ex. rel.* Mygatt *v.* Supervisors of Chenango, *Id.* 563, 573; Morey *v.* Town of Newfane, 8 *Barb.* 645, 649, &c.; *Constitution*, art. VIII., § 1; Darlington *v.* Mayor, &c. of N. Y., 31 *N. Y.* 164, 181, 182, quoting and approving Dartmouth College Case; *Const.* art. I. § 17; Mills *v.* City of Brooklyn, 32 *N. Y.* 489, 496, &c.

BY THE COURT.—DANIELS, J.—Under the law as it existed before the act of 1862 was passed, the power to cause the streets and avenues of the city of Brooklyn to be graded, paved, and kept in repair, and from time to time regraded and repaved, was vested in the common council (*Laws of* 1854, p. 860, ch. 384, title 4, § 1). And, for the purpose of supplying the means of exercising that power, it was provided that the expenses of all such improvements should be assessed, and be a lien, upon the property benefited by them. This was sufficient, after the street in question had been graded, paved, and curbed under the authority thus conferred, to render it the duty of the common council to observe reasonable care and attention in keeping it in that condition. And a careless omission to perform that duty, through which an injury should result to a person entitled to insist upon its observance, would be sufficient to maintain an action in his favor, in a court of justice, for the purpose of securing redress on account of the injury. Mayor of N. Y. *v.* Furze, 3 *Hill*, 612; Wilson *v.* Mayor, &c. of N. Y., 1 *Den.* 595; Lloyd *v.* Mayor, &c. of N. Y., 5 *N. Y.* (1 *Seld.*) 369; Mills *v.* City of Brooklyn, 32 *N. Y.* 489, 500.

But in the present case no such want of reasonable care and attention was shown on the part of the common council, for there was no evidence given on the trial tending to prove that this body had notice of the condition that the streets were in, or that by the exercise of proper diligence and circumspection it should have acquired knowledge of that condition.

Nothing like negligence on the part of the common council was, therefore, made to appear upon the trial of the cause.

Assuming, as, perhaps, that properly should be done, on account of the peculiar form given to the objection on which the motion for a nonsuit was granted, that negligence was shown on the part of the mayor and aldermen, in their omission to communicate to the common council the notice they had each of them received, which is certainly as far as this court can be justified in going under the evidence, then the question arises whether the action against the city should, on that account, have been maintained.

The difficulty in the way of doing that was created by the charter of the defendant (1862, p. 203, § 39).

By this section it is provided that the city itself "shall not be liable in damages for any nonfeasance or misfeasance on the part of the common council, or any officer of the city, or appointee of the common cauncil, of any duty imposed upon them or either of them by the provisions of titles 4 and 5 of this act, or of any duty enjoined upon them or any or either of them, as officers of government, by any other provision of this act, but the remedy of the party or parties aggrieved, for any such nonfeasance or misfeasance shall be by mandamus or other proceeding or action to compel the performance of the duty, or by other action against the members of the common council, officer or appointee, as the rights of such party or parties may by law admit if at all."

The section was very imperfectly and inartistically drawn, but from the fact that the act containing it was an amendment of the act of 1854, which contained titles 4 and 5, while no such titles were contained in the amendatory act, and that those titles included many of the duties imposed upon the common council and officers of the city, it must be presumed that when the legislature used the terms, "this act," in its reference to those titles, it intended to refer to them as they were contained in the act of 1854, as it would be with that of 1862 incorporated into it by the amendments then made. The object of the legislature is clear, and that was to exonerate the city from liability on account of the omission and misconduct of its officers, and to impose all the legal consequences of their acts directly upon the persons who might be guilty of such official misconduct.

And that object can be secured by no other construction of this section.

Construed in this manner, then, it includes the present action, for the real ground of the complaint, upon which it was founded, was that two of the officers of the city had omitted to perform the duties officially enjoined upon them.

The plaintiff claims, however, that he should have been permitted to have maintained his action even under this construction of that section, and several reasons have been urged in support of that position.

The validity of those reasons will now be examined.

It is clear that the plaintiff had no vested right against the city when the act containing this section took effect as a law.

It was enacted on March 27, 1862, and, except one section not requiring notice, it went into effect as a law immediately, while the injury to the plaintiff's premises did not occur until the December following.

This section did not impair the obligation of a contract within the prohibition of the Constitution of the United States upon that subject.

For, even though an implied contract arose out of the acceptance of the act of 1854, that the powers conferred by it should be used and observed for the benefit and advantage of the city, it was not a contract with the plaintiff, but between the city and the State, by whose sovereign act the charter had been conferred.

As to the plaintiff, the obligation on the part of the city was that of a mere duty, and not that of a contract.

But even if it had been, or could be deemed a contract with the plaintiff, still the legislature had the power to change, modify, or amend it, without conflicting with the provision refered to in the Constitution of the United States. For the authority under which the act was passed retained that power over it in favor of the legislature.

This was done in express terms when the power to create corporations was provided for by the present Constitution of the State, article VIII., § 51 of Constitution of 1846.

The language used was explicit, that all general laws and special acts passed pursuant to that section might be altered

from time to time or repealed. When the act of 1854 was passed, it was with this important qualification attached to it by the Constitution.

And that was clearly sufficient to empower the legislature to make the change effected in it, if that was deemed advisable and expedient under the circumstances.

But it is insisted that the alteration made is inconsistent with the right to sue corporations conferred by the last sentence of section 3 of article VIII. of the Constitution.

But that is mainifestly an erroneous view of this section.

For it was no part of the intention of that provision to render corporations liable upon all causes of action, the same as natural persons were, but merely to provide that actions might be maintained against them the same as they could against natural persons, provided the legal causes for doing so were found to exist.

It was to confer the capacity of being sued, not to define the cases in which suits might be maintained against them.

The right of action in cases of this kind arises out of the duty conferred by the statute in favor of the public, and that might have been qualified at the time of the enactment of the statute, precisely as it has been by this amendment.

The legislature had the power to determine the form in which the franchises and obligations of the municipal government should be conferred upon the city, and under the provision made by the Constitution, it did not part with the power by not exercising it at that time.

This section of the act of 1862 was not intended to divest the persons who might be affected by it of their right to redress, but to change and limit their remedies for injuries sustained by them.

And that power has always been deemed to be within the constitutional province of the legislature. Matter of N. Y. Protestant School, 31 *N. Y.* 574–585. The redress may not always prove to be as entirely adequate to the injury as an action directly against the corporation itself; but even if that be conceded, it will not justify the conclusion that the act is in conflict with the Constitution on that account.

In theory the act places the responsibility for the wrongs of

municipal officials where they justly belong—upon the persons by whose misconduct they may be produced.

It should have proceded a step further than it has gone, for the purpose of securing complete redress to those entitled to demand it, by requiring the officials of the city, before they enter upon the duties of their offices, to give ample security for the payment of the judgments recovered against them under its provisions.

The judgment should be affirmed.

WOODRUFF, J. (Dissenting.)—It is not denied, and probably can not be denied, that by virtue of its charter and the act to consolidate the cities of Brooklyn and Williamsburgh, passed in 1854 (*Laws of* 1854, ch. 384), it became and was the duty of the defendant to keep the streets of the city in repair, and that for failure to do so, the defendant was liable to a party who was injured thereby. The plaintiff in this action was nonsuited at the trial, on the sole ground that by the act of March 27, 1862 (*Laws of* 1862, ch. 53, § 39, p. 203), the defendants are relieved from any such responsibility. [The learned judge here quoted the statute as above.]

The claim, therefore, made on behalf of the defendant, is that the city is not liable for the damages sustained by an individual from its omission to perform its duty to keep the streets in repair; but that if, by the rules of law, any or either of its officers are liable therefor, redress may be had, otherwise the party is remediless. An intention to produce such results is not to be imputed to the legislature, unless the terms of the enactment very clearly indicate such design. Against such a construction it is insisted that the liability against which it was intended to protect the city, is expressly limited to damages for nonfeasance or misfeasance of the common council or city officers, in the discharge of duties imposed or enjoined by the act of 1862 itself; that the expression "this act" clearly so limits the operation of the amendment, and that duties and responsibilities previously existing under the charter are not affected. Without inquiring whether the statute of 1862 should be thus strictly construed, or whether, on the other hand, the words "this act" may not mean the act which was thereby

amended, another objection to the construction contended for seems to me well founded. The terms of the act of 1862 do not purport to exonerate the city from any absolute duty which, by force of the pre-existing laws, rested upon it as a municipal corporation, nor from the payment of damages if such duty be not performed. Granting, for the purposes of this discussion, that they are, by force of the act of 1862, relieved of responsibility for the misfeasance or nonfeasance of the common council, or of other officers in the discharge of any duty imposed upon them by any provision of the charter, there is no declaration that the city shall not be bound to the discharge of every duty imposed upon it as a municipal corporation, and be liable for a failure to perform it.

And to my mind there is nothing in the act in question indicating such an intention. Neither the terms nor the reason of the act import such an exoneration.

True, municipal corporations *ex necessitate* act by officers and agents, but absolute duties to act, and to perform, rest upon them, nevertheless, as they do upon individuals, and they are responsible for their failure, as a corporation, in the discharge of such duties.

Among other duties to which they are bound by strict legal obligations, is their duty to pay their debts, duly contracted. And yet, in the raising of money for the purpose, and in their application of the money when raised, they must act through their officers and agents. I apprehend that, if an action were brought against the city of Brooklyn, upon one of its bonds duly issued, the binding character of which was not questioned, counsel would not interpose a defense under the statute now in question, averring that the breach of duty or of obligation consisted in the non-payment of the money according to the tenor of the bond, and this arose from the failure of the officers or the common council to raise or appropriate the money, or the omission of their treasurer to perform his duty to pay it over.

There is abundant scope for the operation of the statute, according to its terms, without extending it to a liability not mentioned in it. In the discharge of the actual duties devolved upon the officers of a municipal corporation, they may be guilty of misfeasance and negligence to the injury of third persons,

and the question has more than once arisen whether the corporation is liable therefor.

Sometimes such officers have been deemed to be agents of the corporation, and the latter liable on the principle of *respondeat superior*. Cases of this kind may be within the design of the statute, assuming, as before assumed, that the term "this act" refers to the charter.

For example, the corporation may assume the duty to construct a sewer within a street of the city. For that purpose the proper officer or agent is directed to perform the work; in the act of performance he does something or omits something which he ought not to have done or omitted, and which works an injury.

This statute would be satisfied by holding that the injured party must look to him, and not to the city, for compensation. Suppose, moreover, that by reason of the construction of the sewer, the street should be, or soon become, in a dangerous condition. The general duty to keep the streets in repair would still rest upon the city, and its legal obligations would not be satisfied until by some means those repairs were made.

In short, the statute may be held to apply to those cases in which the corporation is sought to be charged for the misfeasance or nonfeasance of the officers as its agents. It by no means follows that there is not a clear liability of the corporation for a failure to perform a duty which rests upon it by law.

On this ground the judgment should be reversed.

MASON, J., concurred with WOODRUFF, J., as to construction of the act, but thought, in addition, that, in terms, the section in question was limited to the act of 1862.

All the other judges concurred in the opinion of DANIELS, J.

Judgment affirmed, with costs.

GREEN *v.* THE HUDSON RIVER RAILROAD COMPANY.

June, 1866.

Affirming 28 *Barb.* 9.*

An action cannot be maintained by a husband, as such, for damages to himself by being deprived of the society and assistance of his wife, resulting from her death, caused by the defendants' negligence.

No such action could be maintained at common law, and the statute (*L.* 1847, 575, c. 450; same act, 2 *R. S.* 292), gives an action only to the personal representatives of the deceased, for the benefit of the widow and next of kin, and not to the husband, where the deceased wife could have maintained an action in conjunction with her husband, for an injury to her, if death had not ensued.†

Charles H. Green sued the Hudson River Railroad Company, to recover damages for the instantaneous killing of his wife by the negligence of the defendant.

The facts are stated in the opinion. The complaint alleged that the plaintiff was the husband of Eliza Green; that, on January 9, 1856, the said Eliza was a passenger on the train of the defendants' cars, proceeding from Albany to New York; that, by the gross carelessness and unskillfulness of the agents of the defendants, a collision occurred, by means of which the said Eliza was then and there killed, "whereby the plaintiff has lost and been deprived of all the comfort, benefit and assistance of his said wife in his domestic affairs, which he might and otherwise would have had, to his damage," &c. The defendants demurred to this complaint, as not containing facts sufficient to constitute a cause of action.

On the demurrer the defendants had judgment.

* In June, 1858, an action by the husband, *as administrator* of his wife, was held sustainable; the opinion being rendered by the same judge who delivered the opinion in 28 *Barb.* 9, and the decision was affirmed on appeal to the general term; and the plaintiff recovered a verdict, which, however, was set aside on other grounds, and a new trial ordered in 32 *Id.* 25. The forms of complaint and demurrer are in 16 *How. Pr.* 263.

† By 1 *L.* 1870, 215, c. 78, § 2, the statute is amended so as to allow an action by the personal representatives of the deceased, for the benefit of the *husband* or widow and next of kin.

The supreme court, at general term, affirmed the judgment on the same grounds as are assigned by this court. Reported in 28 *Barb.* 9. Plaintiff appealed to this court.

Morris S. Miller, for plaintiff, appellant;—Insisted that the American cases against the action were based on 1 *Cush.* 475; and Bolton *v.* Baker, 1 *Campb.* 463, which was unsound.

Thomas M. North, for defendants, respondents.

LEONARD, J.—This case involves but a single proposition. It is whether an action can be maintained by a husband for damages arising from the instantaneous killing of his wife by the negligence of the defendants.

The case comes up on demurrer to the complaint, for not stating facts sufficient to constitute a cause of action.

The complaint states, that the wife became a passenger on the defendants' cars; the legal obligation to carry her safely; that she was killed, while a passenger, by the carelessness of the agents of the company, whereby the plaintiff lost the comfort and assistance of his wife in his domestic affairs, which he would otherwise have had, to his damage of fifteen thousand dollars.

The rule at common law is well settled that no damages can be recovered by action for injuries resulting in immediate death. Actions for injuries to the person abate, by the common law, by death, and cannot be revived or maintained by the executor, administrator, or heir of the deceased.

The plaintiff claims a distinction, that his action is not brought for the injuries sustained by his wife, but for his own loss, by being deprived of her society and assistance; something in the nature of the injury sustained by the husband in actions for *crim. con.*

The rule is different, however. It may be remarked, also, that in the latter case, the wife being alive, there is a certainty that the husband might, but for the act of the seducer, have continued to enjoy her society. It is of no practical utility to search for the reason of the rule. It remains somewhat obscure. Whether it arose from the sentimental reason, that the destruc-

tion of life by negligence was an injury that could not be compensated in damages, as suggested by a learned judge, Baron PARKER, in an English case, or from the policy of the law to secure a greater safety to life and limbs by merging or drowning the right to damages by a civil action in the felony resulting from the killing of a human being by the negligent act of another, thus insuring the co-operation of the next of kin, as may be supposed, in a vigorous prosecution of the criminal, and preventing the composition or settlement of such offenses, as I am inclined to believe, it is now of little consequence to inquire. It is sufficient that the rule is settled so firmly that courts would travel beyond their province into the boundaries of legislation by any attempt to alter it, or to create, by their decision, causes of action not before known.

The parent cannot, at common law, recover for the loss of the services of his child, nor the wife or child for the loss of the care, support and nurture of the husband or father where his death has been brought about by the act of another, whether negligent or willful. The loss in each of these cases is of the same character as that sustained by the plaintiff. These are injuries for which the law formerly afforded no redress in damages. Recently the legislature have intervened by enactment in this State, and in several other States of the Union, and also in Great Britain, and the common law rule has been modified so as to give a right of action for the benefit of the wife and next of kin of the deceased by the personal representatives where the party injured might have recovered damages in respect thereof, if death had not ensued. *L.* 1847, c. 450, amended *L.* 1849, c. 388, 256; 2 *R. S.* 292. This modification does not extend to giving a right of action to the husband, where his deceased wife could have maintained an action in conjunction with her husband, for an injury to her, if death had not ensued. The husband must wait till legislative wisdom has modified the rule of law in his favor, too, before he can maintain such an action as the present one.

But two cases can be found in the reports of decisions in this State, giving the slightest authority for bringing this action, and those, as reported, will not be found, on a critical examination, at variance with the former current of authority, or

will be found to be remarks not called for by the case then before the court. The first is the case of Ford *v.* Monroe, 20 *Wend.* 210. It appears from the facts as reported, that the plaintiff recovered for the loss of the services of his son, a child of ten years, killed by the negligence of the defendant's servant in driving a gig. There appears to have been no question raised or considered in respect to the cause of action, except only as to the proof of the relation of master and servant existing at the time, and the allegation of special damage in the declaration, and the proof of the direct consequential relation of the damage to the act complained of. The small amount of the recovery, only two hundred dollars, might lead to the inference that the recovery was for the expenses of interment, or that some care and expense were bestowed in an attempt to recover the child. The charge of the judge, that the plaintiff would be entitled to recover for the services of the child till he became twenty-one years of age, if the act was caused by the negligence of the servant, leads to the inference that the recovery was upon a ground analogous to that urged in the case at bar. It does not appear that any exception was taken to the charge, or that it was made the ground of the application for a new trial, and the subject is not referred to in the opinion of the court in the most distant manner.

BRONSON, J., who was one of the judges in the case of Ford *v.* Monroe, says, in the subsequent case of Pack *v.* Mayor, &c. of N. Y., 3 *N. Y.* 489, 493, where the court below had charged that the plaintiff could recover for the probable pecuniary profit of his child's services, until he became of age, the child having survived the injury an hour and a half, that he has "a strong impression that the father could recover nothing on account of the injury to the child, beyond the physician's bill and funeral expenses," citing *Reeve Dom. Rel.*, and Ford *v.* Monroe, as authority for the position. Unless the memory of Judge BRONSON served him for something not to be found in the report of the case of Ford *v.* Monroe, he would hardly have referred to it as authority for the position stated in Pack *v.* Mayor. The other case cited by the plaintiff's counsel, from the reports of this State, is that of Lynch *v.* Davis, a decision of the special term of the supreme court, reported in 12 *How. Pr.* 323.

That action was brought by the plaintiff, as the administrator of his wife, against the defendant for causing her death by malpractice as a physician. The defendant demurred to the complaint, and the court very properly sustained it. The action appears to have been brought under the act of 1847, which gives an action to the personal representatives of the person injured and dying, when the injured person, if living, might have maintained an action. The judge says that the action would have been the husband's had she lived, though she, being the meritorious cause, must have been joined.

The whole authority of the case is that the statute does not give an action to the personal representatives of a married woman against any person for wrongfully causing her death.

The judge also states as a fact within his own knowledge outside of the case before him, that the plaintiff had brought an action in his own behalf, founded on the breach of the defendant's obligation under his employment as a physician, for the damages sustained by reason of the loss of the society and aid of his wife, and had recovered such damages as a jury thought fit to award him. The particulars of that other action are not stated. It is highly probable that the death of the wife was not instantanious, and that the husband had bestowed his care, and incurred expense, as well as sustained the loss of her society and aid, during the time she survived after the commission of the acts of malpractice which caused her death, so that a technical right of action existed for the recovery of damages by the husband in his own right. It would then have been in the power of the jury to have measured the damages very liberally in such a case without violating any rule of law. The dicta of the judge can be explained only upon the theory suggested:

"The judge says in that case, *obiter*, that the common law gave the husband and the father a right to recover of the wrongdoer the pecuniary injury he had sustained by reason of the killing of his wife or child. The husband had availed himself of this right of action, in this very case, to recover damages for the loss of his wife. The object of the act of 1847 was to extend the same rule to the wife and child, so that they also

will be found to be remarks not called for by the case then before the court. The first is the case of Ford *v.* Monroe, 20 *Wend.* 210. It appears from the facts as reported, that the plaintiff recovered for the loss of the services of his son, a child of ten years, killed by the negligence of the defendant's servant in driving a gig. There appears to have been no question raised or considered in respect to the cause of action, except only as to the proof of the relation of master and servant existing at the time, and the allegation of special damage in the declaration, and the proof of the direct consequential relation of the damage to the act complained of. The small amount of the recovery, only two hundred dollars, might lead to the inference that the recovery was for the expenses of interment, or that some care and expense were bestowed in an attempt to recover the child. The charge of the judge, that the plaintiff would be entitled to recover for the services of the child till he became twenty-one years of age, if the act was caused by the negligence of the servant, leads to the inference that the recovery was upon a ground analogous to that urged in the case at bar. It does not appear that any exception was taken to the charge, or that it was made the ground of the application for a new trial, and the subject is not referred to in the opinion of the court in the most distant manner.

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The whole authority of the case is that the statute does not give an action to the personal representatives of a married woman against any person for wrongfully causing her death.

The judge also states as a fact within his own knowledge outside of the case before him, that the plaintiff had brought an action in his own behalf, founded on the breach of the defendant's obligation under his employment as a physician, for the damages sustained by reason of the loss of the society and aid of his wife, and had recovered such damages as a jury thought fit to award him. The particulars of that other action are not stated. It is highly probable that the death of the wife was not instantanious, and that the husband had bestowed his care, and incurred expense, as well as sustained the loss of her society and aid, during the time she survived after the commission of the acts of malpractice which caused her death, so that a technical right of action existed for the recovery of damages by the husband in his own right. It would then have been in the power of the jury to have measured the damages very liberally in such a case without violating any rule of law. The dicta of the judge can be explained only upon the theory suggested:

"The judge says in that case, *obiter*, that the common law gave the husband and the father a right to recover of the wrongdoer the pecuniary injury he had sustained by reason of the killing of his wife or child. The husband had availed himself of this right of action, in this very case, to recover damages for the loss of his wife. The object of the act of 1847 was to extend the same rule to the wife and child, so that they also

might recover the pecuniary damages they had sustained by the wrongful killing of the husband or father."

The learned judge cites no authority for the rule of the common law as stated by him, and I think he would be unable to find it laid down to that extent. He is, I think, also under some error in respect to the object of the act of 1847. The purpose of that act was to give a right of action where none existed before on account of the death of the person injured. It was to remove the disability arising from the common law rule that personal actions died with the person.

The English act giving the same remedy as that contained in our act of 1847, enacted in the parliament of Great Britain, August 26, 1846, a few months only prior to the adoption of the act by the legislature of this State, recites the rule of the common law thereby modified in these words, viz: "Whereas no action at law is now maintainable against a person who by his wrongful act, neglect or default, may have caused the death of another person, and it is sometimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him;" thus stating the mischief and the remedy intended.

The two cases referred to are not authority for the principles invoked by the plaintiff, which are necessary to sustain his action, except in a very inferential and doubtful manner.

At all events they cannot overthrow the rule of the common law before stated, and which may be found more fully in the following authorities: *Tayl. Exr.* 436; Whitford *v.* Panama R. R. Co., 23 *N. Y.* 465, 476; Oldfield *v.* N. Y. & Harlem R. R. Co., 14 *N. Y.* 310, 416; *Sedgw. on Dam.* 551 (marginal).

The subject was very fully and learnedly considered by Justice BACON, when this case was before him at special term, in an opinion afterward adopted at the general term on appeal and now reported in 28 *Barb.* 9. The case required no further discussion than is so well and carefully given in 28 *Barbour*, and I am conscious of having added very little to the subject, although I have examined it at some length.

The judgment should be affirmed, with costs.

HUNT, J. [After reciting the pleadings as above.]—The

plaintiff bases his claim upon the legal idea that he was entitled to the services of his wife during her life, and that the defendants, by carelessly and illegally shortening her life, destroyed the value of such services, and that he thereby suffered a pecuniary damage. The husband is, by the common law, entitled to the services of his wife for his own pecuniary benefit. He may sue for and recover the value of her labor, as a debt due to him, in the same manner that a father is entitled to the services of his minor child, and may demand and is entitled to receive her wages or the value of her labor in whatever form it may be presented. That this is the rule, unless such demand is limited to the life of the wife, and is destroyed by her death, is not denied.

The plaintiff cites in his favor, Cross *v.* Guthry, 2 *Root*, 90, decided in the superior court of Connecticut, in 1794. The plaintiff alleged in that case that he had employed the defendant to perform a surgical operation upon his wife, the defendant being a surgeon, and declaring himself competent, well and skilfully to perform the operation; that the operation was performed so ignorantly, negligently and unskillfully, that the wife died in a few hours thereafter. He further alleged that he had thereby been put to great cost and expense, and deprived of the service, company and counselship of his wife, and claimed damages to one hundred pounds. The jury found for the plaintiff forty pounds; and, on appeal, the court sustained the verdict, saying that the rule urged by the defendant, that the private injury was merged by the death of the wife in the public offense, was applicable only to capital crimes, where, from necessity, the offender must go unpunished or the injured individual go unredressed.

The plaintiff also cites Plummer *v.* Webb, *Ware*, 75, in which the plaintiff sought to recover damages for the death of his minor son, caused by the cruel and illegal treatment of the defendant. This case was decided against the plaintiff on the ground that at the time of the death of the son, the defendant, as captain of the ship, and not the father, was entitled to his services. The learned judge discusses the principle under consideration, and argues at length in favor of the right to recover in such cases. As it was expressly decided, however, on the

ground mentioned, this can hardly be considered an authority in favor of the plaintiff.

Ford *v.* Monroe, 20 *Wend.* 210, was an action brought by a father to recover damages arising from the killing of his child by the negligence of the defendant's servant. The judge, at the circuit, charged the jury that the plaintiff was entitled to recover such sum by way of damages as they should be of opinion the services of the child would have been worth to him until he became twenty-one years of age. The case was carried to the supreme court, and the verdict of two hundred dollars in favor of the plaintiff was sustained. This case has been much criticised in the New England authorities, and it is certainly quite remarkable that neither the counsel nor the court allude to the question now before us. The only point discussed was the authority of the servant.

Lynch *v.* Davis was a special term decision (12 *How. Pr.* 323), in which the plaintiff brought an action *as administrator*, under the law of 1847 (*L.* 1847, 575, c. 450), to recover damages for the death of his wife. On demurrer to the complaint, the court held the demurrer well taken, and dismissed the complaint. In his general discussion of the case, the judge states that the action could be maintained by the husband in his individual character. As the case was, however, decided on another point, and the question now before us did not there necessarily come up, it cannot be considered as an authority in favor of the plaintiff.

The plaintiff's case rests, therefore, on the authority of Cross *v.* Guthry, with such aid as it may derive from Ford *v.* Monroe.

The plaintiff's position cannot be maintained against the array of authorities and dicta which the defendants have massed against it. I will refer to a portion of them only.

In Higgins *v.* Butcher, *Yelv.* 89, the court held that "if one beat the servant of J. S. so that he die of the beating, the master shall not have an action against the other for the battery and loss of service; because, the servant dying of the beating, it is a felony, and this has drowned the particular offense, and prevails over the wrong done to the master, and his action by that is gone." The decision is in point, although the reason given is not now a sound one.

Baker *v.* Bolton, 4 *Campb.* 493, decided in 1808. The plaintiff's wife was thrown from the top of a stage-coach, by the negligence of the defendant, and so badly injured that she died in about a month. The action was to recover damages for being "deprived of the comfort, fellowship and assistance of his wife." It appeared in the case that the plaintiff was a publican, and that the wife was of good use to him in his business. Lord ELLENBOROUGH held that he could only recover damages for the loss from the time of the injury till the death; that "in a civil court the death of a human being could not be complained of as an injury, and in this case, the damages as to the plaintiff's wife must stop with the period of her existence."

In Carey *v.* Berkshire Railroad Co., 1 *Cush.* 475, A. D. 1848, the plaintiff's child was instantly killed by the carelessness of the defendant's servant, and the father brought his action to recover damages for his loss of service. The court declared the common law to be decisive against the action. In relation to Ford *v.* Monroe, the court say, "that no question was then raised concerning the legal right of the plaintiff to recover damages caused by the killing of his son. For aught that appears in the report that point was assumed, and passed *sub silentio* both at the trial and in the bank."

In Lucas *v.* N. Y. Central R. R., 21 *Barb.* 245, A. D. 1855, the general term of the sixth district held distinctly, "that the instant killing of the plaintiff's wife by the careless act of the defendant, cannot give the plaintiff an action for the loss of her services. Death following instantly upon the act complained of, there was no time during her life when it could be said that the husband had lost the services of his wife in consequence of the injury complained of."

The question is discussed and the same principles laid down in Nickerson *v.* Harriman, 38 *Me.* 277, A. D. 1854, and in Connecticut Mut. Life Ins. Co. *v.* N. Y. & New Haven R. R. Co., 25 *Conn.* 265, A. D. 1856, but the cases were in part at least decided on other points.

The principle in opposition to the plaintiff's right of recovery is laid down in *Smith's Master and Servant*, 85, 75 *Law Library*, citing older cases.

The same view of the question has been repeatedly announced by the different judges of this court, although the question has never been distinctly presented or formally decided until the present case. It was so stated by DAVIES, J., in Whitford *v.* Panama R. R. Co., 23 *N. Y.* 465, 475, 476, and by COMSTOCK, J., in the same case, *Id.* 484, 485; and again by the latter judge in Quin *v.* Moore, 15 *N. Y.* 432, 436. The same rule was laid down by WRIGHT, J., in Oldfield *v.* N. Y. & Harlem R. R. Co., 14 *N. Y.* 310, 316, and by BRONSON, J., in Pack *v.* Mayor of N. Y., 3 *N. Y.* 489, 493. The same rule has also been laid down by BOSWORTH, HOGEBOOM, SUTHERLAND, WOODRUFF, INGRAHAM and HOFFMAN, JJ.; but it is scarcely necessary to multiply this class of references, where the case was not decided upon the precise proposition now in question.

In many elementary authorities cited by the defendant, the principle of "*actio personalis moritur cum persona*" is laid down, and in 1 *Williams on Executors*, p. 668, the principle is broadly stated thus: "If an injury was done either to the person or property of another, for which damages only could be recovered in satisfaction, the action died, with the person *to* whom or *by* whom the wrong was inflicted." That principle, in my judgment, does not touch the present class of cases. In its legal aspect, the injury here complained of was done to the plaintiff, and not to his deceased wife. The claim is for compensation for injury to his rights, and not to hers. Should her executors bring their action to recover damages for the pain and anguish suffered by her from the cause alleged, the principle of *actio personalis* would find its proper application. It is not applicable to the action of the present plaintiff, in which the party alleged to be injured, and the party inflicting the injury, are still in existence. It is the subject matter of the injury, merely, which has ceased to exist.

If the rule of the common law is harsh or narrow, it is for the legislature to alleviate the evil, and enlarge the remedy. This has been done in some degree in this State, and in Great Britain much more extensively by the act 9 and 10 Victoria, ch. 93. However strong may be our sympathy with the plaintiff, we are compelled to content ourselves with expounding the

law as we find it. The right to correct or improve it belongs to another department of the government.

Judgment affirmed, with costs.

HAKES *v.* PECK.

December, 1863.

An agreement between the vendor and purchaser of land, by which the vendor guarantees that it shall sell, "within a year," for a stipulated price, and if not, he will pay the deficiency, does not bind the purchaser to hold the land, at that price, throughout the year. He may sell at any time within the year, even at auction, if in good faith.*

Jeremiah S. Hakes sued John M. Peck in the supreme court, to recover two hundred and fifty dollars, claimed to be due under an agreement made by the defendant on an exchange of lands between them.

The contract was a written agreement between the parties, dated October 1, 1854, which recited that they have exchanged certain lands, and that the plaintiff had received a conveyance from defendant, at the same time as the making this agreement, of a city lot in Troy, and contained the following clause: "I have valued said lot at the sum of one thousand five hundred dollars, and do hereby stipulate that said lot shall sell, within one year, at that price, or over; and in case of its not selling for that amount, I will make up the deficiency in cash to said Hakes within sixty days, with interest, after such sale."

The plaintiff endeavored, without success, to find a purchaser, and asked defendant to find one; not obtaining any offer, he advertised the lot for sale at auction, gave defendant notice of the sale, and defendant was present at the sale when, or immediately before the property was bid off. The sale was on

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* Compare Mahaiwe Bank *v.* Culver, 30 *N. Y.* 313; and Lorillard *v.* Silver, 36 *N. Y.* 578.

June 18, 1855, for one thousand two hundred and fifty dollars, which was the highest sum bid.

The supreme court, at general term, on hearing the exceptions taken at the trial, held that the contract must be construed as a personal guaranty that the lot taken in exchange should prove saleable in the market *at any time* within the year, for the sum at which the vendor had valued it, and did not entitle the vendor to the whole year in which to find a purchaser. They accordingly gave judgment for plaintiff. Defendant appealed.

John H. Reynolds, for defendant, appellant.

J. A. Millard, for plaintiff, respondent.

INGRAHAM, J.—The principal question in this case depends upon the construction of the agreement between the parties, by which the defendant undertook to make up the deficiency if the lot did not, within a year, bring one thousand five hundred dollars. The defendant contends that he had a right at any time within the year to find a purchaser at that sum, and that the sale by the plaintiff before the year expired, put it out of the power of the defendant to fulfill his agreement. I do not see anything in the contract that rendered it necessary for Hakes to hold the title to the lot for the year. The agreement was that it should sell for one thousand five hundred dollars within one year, and if, after Hakes had sold the lot, the purchaser had resold it within the year for one thousand five hundred dollars, that would have been a defense to this action. Nor is there anything requiring the offer of one thousand five hundred dollars from a purchaser to be made to Hakes. A like offer made in good faith to the purchaser, even if refused by him, would have shown the value to be one thousand five hundred dollars within the year, and an offer to the purchaser would have been as effective to fix the value as a like offer would have been if made to the plaintiff.

The proper construction of this agreement is, that Hakes should ascertain the value by a sale some time within the year,

and that he should not hold the lot longer than that time, and afterward, by selling it for a less sum than one thousand five hundred dollars, charge him with the deficiency. The contract clearly contemplated a sale within the year. If the defendant is right in his construction, there could be no sale within the year for less than one thousand five hundred dollars. Bnt if so, how could there be a deficiency made, or how could the amount of deficiency be ascertained? Not before the year expired, because if so, the defendant's claim to have the whole year to find a purchaser would fail. If after the year, that would be contrary to the contract, which provided for paying any deficiency within the year. The construction put upon the contract in the court below was the correct one, viz: that if the plaintiff chose to sell the lot within the ensuing year it would bring one thousand five hundred dollars, and if it did not, the defendant would make up the deficiency between that sum and the amount the lot should bring if sold within the year. Suppose the plaintiff had not offered the lot for sale within the year, could he have maintained any action against the defendant? I think not. The contract evidently means that the plaintiff should act in good faith, in selling at a reasonable time and using proper means to get a fair price. If after so doing, the property did not bring the sum agreed on, the defendant became liable to pay the difference.

There was an exception to the admission of the evidence showing the market value of the lot during the year. This point has not been taken before us on the argument. The evidence was clearly admissible, if for no other purpose, to show good faith on the part of the plaintiff in making the sale, and that the defendant was not injured by selling it within and before the termination of the year.

The judgment was right, and should be affirmed.

T. A. Johnson, J. [After briefly referring to the above facts.]—The stipulation plainly contemplates a sale by the plaintiff of the premises, for the purpose of converting the same into money within the year following its date, and provides for the payment of any deficiency in case there should be any upon such sale. The sale was of course to be made by the

plaintiff, as he was the sole owner and at liberty to sell or retain the premises at his option. If he elected to keep the lot, it operated as a satisfaction of the one thousand five hundred dollars, at which it was valued. If he elected to sell, the stipulation provided that it should bring one thousand five hundred dollars or over, upon such sale, within the year, or the deficiency should be paid with interest from the date of the sale.

The only question in the case is, at what time within the year could the plaintiff sell and hold the defendant to this stipulation? The answer seems to me very plain. No time of sale is fixed by the instrument except "within one year." And as it is left optional with the plaintiff to sell or not, as he might choose, it follows, I think, very clearly, that he was to be at liberty to sell at any time within the year when it might be desirable on his part to convert the land into money. Of course, there was an implied obligation on the part of the plaintiff to act in good faith, and obtain the best price which could be obtained with reasonable exertion. There is no pretense that this has not been done. The defendant had notice of the sale, and was present, but did not offer to take the lot at the one thousand five hundred dollars, or any other price. He certainly had then a fair opportunity of cancelling his obligation by taking the lot off the plaintiff's hands. This he declined or neglected to do. It is claimed on behalf of the defendant that he had the whole of the year within which to make the required sum by the sale of the lot, and that he was to be the actor, and the plaintiff had no right to sell until the last day of the year. But this is a mistake. The plaintiff was to be the actor. He could sell or not as he choose. If he sold, it was to be at defendant's risk as to price, and this right he has exercised within the general limit. Clearly the defendant had no power to sell, or to control the plaintiff as to time within the general scope. He might have found a purchaser for the plaintiff had he chosen so to do at the valuation, or offered to take the land at that price himself, at any time before the plaintiff elected to sell, or at the time of the sale, and thus have absolved himself from his obligation. But he could not lie still, and compel the plaintiff to keep the land through the year, as that was no part of the stipulation. The meaning of the agreement is that

the lot should sell at any time within the year at which the plaintiff might in good faith desire and elect to sell, for the valuation or over. As it was sold for less, at a fair sale, within the time, the defendant is liable for the deficiency with interest.

The judgment of the supreme court is right, and should be affirmed.

All the judges concurred, except DENIO, Ch. J., and H. R. SELDEN, J., who dissented.

Judgment affirmed, with costs.

GRIGGS *v.* HOWE.

September, 1866.

Affirming 31 *Barb.* 100.

Under an answer alleging usury at a rate equivalent to about two per cent. a month, proof of usury at about four per cent. a month is a material variance, if the plaintiff be misled thereby.

A party whose evidence is objected to for variance from his pleading, waives his right to require proof that the objecting party has been misled, if he does not insist upon it at the trial.

Where a creditor recovers judgment on a collateral security for his debt, and succeeds in collecting a part of the debt, it is proper to deduct from the proceeds a reasonable counsel fee, especially if attorney's fees were not included in the judgment, before applying the balance to the extinguishment of the principal debt.

George M. Griggs, Miles W. Bennett and William L. Lothrop sued Otis B. Howe, S. T. Arnot, N. G. Herrick and H. H. Howe, in the supreme court, on defendants' acceptances of two bills of exchange, drawn by H. L. Webb, for one thousand two hundred and fifty dollars each, dated June 9, 1855, and accepted by the defendants under the name of Otis B. Howe & Co.

The answer among other defenses set up usury and alleged that plaintiffs had in one contract discounted the drafts at the rate of two per cent. a month, or twenty-four per cent. a year, and that the illegal interest thus taken was one hundred and twenty-five dollars.

On the trial it was proved that the drafts were drawn and accepted in blank as to the amount, under an agreement that they were not to be filled up for an amount exceeding one thousand dollars.

Webb, the drawer, afterward filled them up with the sums of one thousand two hundred and fifty dollars each, and negotiated them to the plaintiffs before maturity. The evidence respecting this negotiation of the drafts offered on the trial went to show that plaintiffs discounted them at the rate of one-eighth of one per cent. per day, or about twice the discount alleged in the answer.

The defendants also proved that they had transferred to plaintiff a note made by others, for two thousand dollars, as security for these drafts, and that plaintiffs had sued on this note, and collected by judgment and execution over one thousand nine hundred dollars, of which they were bound by their agreement to apply the net proceeds to the payment of the drafts. To meet this evidence plaintiffs proved that the total proceeds of the sale on execution were one thousand nine hundred and twenty dollars and seventy-four cents; that their attorneys received one thousand five hundred and ninety-eight dollars and seventy-six cents, and paid over to plaintiffs one thousand four hundred and ninety-eight dollars and seventy-six cents, reserving one hundred dollars for their own fees, as they had entered the judgment without waiting to tax costs.

At the close of the evidence defendants asked leave to amend their answer to conform it to the evidence as to the amount of usury. The court, after hearing both sides (plaintiffs objecting on the ground that they were surprised), granted the motion on condition that the cause go over, &c., which defendants refused to accede to, and the court submitted the case to the jury.

The judge charged that failure to prove the usurious agreement as alleged in the answer was a failure to prove that defense. Proof of usury was not a substantial proof of the particular allegation in the answer, and that accepting the drafts for the purpose of taking up outstanding paper on which defendants were indorsers, was not accepting for accommodation merely; and that if plaintiffs were *bona fide* holders, the drafts

were not void because of the excess in filling them up. Plaintiff had a verdict and judgment.

The supreme court, at general term, held, that defendants, in pleading usury, were bound to set up in their answer the terms of the usurious agreement, and the amount of the usurious premium or interest taken by the lender, and that the usury must be proved as set up in the pleading. They also held that the terms imposed by the court as a condition of amendment were just, and in answer to defendant's objection that the judge erred in imposing conditions of amendment since there was no legal proof offered that defendants had been surprised or misled, the court said that plaintiffs had waived that objection by failing to take it at the trial, in which case the proper proof might have been made by affidavit. In reference to the alteration in the notes made by Webb, the court held that this would not invalidate the notes in the hands of plaintiffs, who were holders for value, and that the acceptors having themselves put it into Webb's power to do the wrong, they could not be allowed to shift the loss from themselves, and cast it upon a *bona fide* holder for value. (Reported in 31 *Barb.* 100.) Defendants appealed to this court.

John H. Reynolds, for defendants appellants;—That there was no variance under the code between the proof and the answer, cited Catlin *v.* Gunter, 11 *N. Y.* (1 *Kern.*) 368; Fay *v.* Greensteed, 10 *Barb.* 321; Dugal *v.* Summers, 23 *N. Y.* 491. Plaintiffs, having come into possession of the notes under a corrupt and usurious agreement, cannot be regarded as *bona fide* holders. The sheriff's claim for rent and auctioneer's fees was without semblance of law, and there was no evidence to show that the retention of one hundred dollars by the plaintiffs' attorney was proper. For aught that appears they might with equal propriety have retained one thousand dollars.

Waldo Hutchins and *Lyman Tremain*, for plaintiffs, respondents;—That the variance was material, cited Manning *v.* Tyler, 21 *N. Y.*, 567. That it could not be now objected that there was no proof that plaintiffs had been misled. Brown *v.* Cayuga & Susq. R. R. Co., 12 *N. Y.* (2 *Kern.*) 486. The filling up of

the drafts by Webb for a larger amount than he was authorized to do is no defense against the plaintiffs if they are *bona fide* holders. Mitchell *v.* Culver, 7 *Cow.* 336, and cases there cited.

PECKHAM, J.—The only questions presented in this case arise upon the charge, and the refusal to charge, of the judge. His refusal to charge that the answer was broad enough to admit the defense of usury I think was right. The answers set up that the interest deducted by the plaintiffs, by agreement on discounting the two drafts, was one hundred and twenty-five dollars, which was at the rate of two per cent. a month, or twenty-four per cent a year for the time the draft had to run. The proof showed that the drafts were discounted at different times, and by several separate contracts, and at a rate of interest of about one-eighth of one per cent. a day. The amount received by the drawers on the discount of both or either of the drafts the witness could not state, as he did not recollect the date of either discount.

There was certainly some variance. Two several contracts set up as one, and there was a large difference in the amount of interest reserved, between the proof and the answer.

The defendant's counsel seemed at first of the opinion that the variance was material, and they asked "permission to amend the answers to conform to the facts," in reference to the amount of usury taken.

The court granted the motion upon terms, which the counsel declined to accept, and then insisted that the answers were sufficient without amendment.

Prior to the Code this variance would have been fatal to the defense of usury in any court. Catlin *v.* Gunter, 11 *N. Y.* 368, 373; New Orleans Gaslight Co. *v.* Dudley, 8 *Paige*, 452, 457; Morse *v.* Cloyes, 11 *Barb.* 100; Cloyes *v.* Thayer, 3 *Hill* 564, 565.

The Code provides a new rule as to the question of variance; it declares that "no variance between the allegation in a pleading and a proof shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." *Code of Pro.* § 169.

The plaintiffs in this case claimed to have been actually

misled to their prejudice. It was not insisted by the defendants that any proof thereof should have been given to the court, as required by the Code, but without objection it was apparently assumed that the statement was true, and on that assumption the amendment was granted upon terms, and no objection or exception was made or taken by the defendants. It is too late to object now either to the absence of proof of being misled or to the decision of the court as to the terms upon which the amendment was allowed.

In the absence of any objection to the want of proof of being misled, it must be assumed that the parties assented to the truth of the statement, and to the propriety of a decision being made without such proof. The defendants had the legal right to demand the proof as the Code provides, or they might waive the strict proof and accept a statement of counsel in lieu of proof, nor was any objection or exception taken to the decision of the court on the application to amend. Of course that decision cannot be reviewed.

It was then legally decided that this was a material variance under the Code. The proof to establish the defense of usury was, therefore, inadmissible under this answer.

The defendants insist here, that these drafts having been filled up by the drawer for sums larger than he was authorized to do by the acceptors, are void as against any but *bona fide* holders, and that the plaintiffs are not *bona fide* holders. No such point was taken at the trial.

On the contrary, the defendants insisted there, in various forms, that the drafts, under the circumstances, were forgeries, and were absolutely void. To the charge of the court that they were not void, but valid in plaintiffs' hands, if the plaintiffs were *bona fide* holders, the defendants excepted, though their counsel here properly concedes that the proposition was legally sound.

The court, so far as the case shows, did not direct a verdict. It must be presumed, in the absence of any evidence to the contrary, that the court decided properly and charged legally. Indeed, if the charge or decision were otherwise, and no exception taken, this court could not review it or reverse for any

such cause. This court can only review such decisions of a trial court as are excepted to.

It is insisted here that the plaintiffs are not *bona fide* holders; whether they were or not, under the evidence, is an interesting question.

The question of usury, as such, with all its penalties, is out of the case.

It seems to me quite clear that a party may be a *bona fide* holder of commercial paper void for usury, and he may recover upon it, provided the usury is not pleaded.

If a note, usurious in its inception, in the hands of A., the payee who had exacted and received usurious interest on its discount, were then before its maturity passed to B. for full value advanced in the ordinary course of business, I think B. would be a *bona fide* holder, and would recover unless usury were pleaded.

Banks are in the daily habit of discounting notes for their customers, without a word of inquiry as to the origin or consideration of the note; occasionally they may take a note void for usury, or by the statute against betting and gaming, still I think it cannot be denied that they are *bona fide* holders. Yet, even such holders cannot recover upon paper void for usury, or as given for a gaming debt, if such defense be pleaded. If not pleaded, as in the case at bar, but some other defense is relied upon, the *bona fide* character of the holder would exclude that defense, unless it made the paper void.

If the holder himself had intentionally taken usury, I agree that he could not be deemed a holder in good faith. Such are the cases of Ramsdell *v.* Morgan, 16 *Wend.* 574; Dean *v.* Howell, *Hill & D. Supp.* 39; Keutgen *v.* Parks, 2 *Sandf.* 60.

But suppose the holder did not give the full amount of the draft in purchasing, does it necessarily follow that he cannot be a *bona fide* holder?

Had these drafts been accepted for value, of course they could have been legally sold at any price. Had the drawer so represented them by the authority of the acceptors, they could have been sold as any other chattel and the parties estopped from setting up usury. Holmes *v.* Williams, 10 *Paige*, 326.

Suppose the holder purchased the drafts at a usurious rate

of interest, in the honest conviction that they were business paper, but without any such representations by the drawer, would he then be a *bona fide* holder? There are authorities in the affirmative. Gould *v.* Segee, 5 *Duer*, 260, 270; Mechanics' Bank of Williamsburgh *v.* Foster, 44 *Barb.* 87.

Such may have been the purchase in this case. The facts disclosed on the trial leave it uncertain. The only proof by the defendants simply showed that the drawer "negotiated these drafts to the plaintiffs," and the amount he received for them. The plaintiffs offered to prove "statements made to plaintiffs by the drawer at the time of the transfer," which the court rejected on the defendants' objection; although it is quite clear that the transaction between the parties was usurious, and the drafts would have been void for that cause had that defense been pleaded.

Possession of these drafts by the drawers was *prima facie* evidence of ownership for a good consideration. James *v.* Chalmers, 6 *N. Y.* (2 *Seld.*) 209.

Had the plaintiffs a right to rely upon this, or upon any other evidence of a like tendency, and purchase the drafts at their fair market value, subject only to the peril of usury if they were not business drafts and usury were pleaded?

To constitute a party a *bona fide* holder, it is now only necessary that he should have taken the paper for value advanced in in the ordinary course of business. He is not bound to make inquiries, nor to act upon circumstances which would put an an ordinarily careful man upon inquiry, unless they are of such a character as to impeach the honesty of the holder. Gross negligence, even, has been held insufficient to impeach his holding, "where a party has given consideration for the bill." Goodman *v.* Harvey, 4 *Ad. & E.* 870; Belmont Branch Bank *v.* Hoge, 35 *N. Y.* 65, and cases there cited.

I do not deem the decision of this point necessary to the determination of this case, and therefore express no opinion upon it.

The only other ground of error urged is, that the court allowed a deduction from the amount of the proceeds of the judgment upon the security assigned to the plaintiffs "beyond the legal poundage and fees of the sheriff."

The gross amount proceeds of the notes were one thousand nine hundred and twenty dollars and seventy-four cents. From which were deducted by the sheriff:

For auctioneer's fees,	$108 79
Rent,	118 57
Sheriff's bill,	94 64
Attorney's fees,	100 00
	$421 98

No special objection to any particular item was made, only the judge was requested to charge that no deduction could be made "beyond the legal poundage and fees of the sheriff." Therefore, if either or any part of either of the other items might properly be deducted, the objection fails.

In entering up the judgment no attorney's fees were included, and the judgment was not all collected, from insufficiency of property. It was entirely proper, then, to deduct a reasonable compensation for the attorneys; not entirely to be governed by the fee bill, but a sum proper as between attorney and client.

The judgment should, therefore, be affirmed, with costs.

All the judges concurred, except SMITH and HUNT, JJ., and except PORTER, J., not voting.

Judgment affirmed, with costs.

HACKLEY *v.* HOPE.

December, 1868.

After a sole plaintiff has assigned his interest in the subject of litigation to one of several defendants, and a decree has been made in favor of such defendant against the other defendant, an appeal cannot be maintained in the name of the plaintiff for the benefit of the unsuccessful defendant; and such an appeal with the usual undertaking to stay proceedings is not effectual to stay the execution of the decree.

Andrew J. Hackley brought an action against Anthony S. Hope and Joshua Burt, in the supreme court, for an accounting and settlement of partnership accounts, and a division of the funds

among the partners, who had each a one-third interest. All of the funds of the copartnership were in the hands of the defendant Hope. The defendants, Hope and Burt, united in a joint answer, the defendant Hope admitting that there was a balance in his hands belonging to himself and defendant Burt, and claiming that Hackley had been paid in full his share.

There was no pretense, upon the trial, that Burt had been paid his share, but the controversy was between the plaintiff, Hackley, and Hope and Burt the defendants. During the trial, Hackley and Hope settled and adjusted all their accounts in relation to the copartnership funds, and Hackley assigned and transferred all his interest in the concern to Hope; and this settlement and release, between Hope and Hackley, being put in evidence, the referee decided that Hackley of course was not entitled to any decree in his favor, and made a decree against Hope, in favor of Burt, for over seven thousand dollars. Hope has not appealed from this decree, but the plaintiff, Hackley, has, and gave the usual undertaking to stay all proceedings on the judgment. This appeal of Hackley, it now turns out is prosecuted for the benefit of Hope. The defendant Burt having issued an execution on his decree against Hope, he made a motion at special term to set the same aside, which was denied, and Hope appealed to the general term, when the order of the special term was affirmed, and Hope again appealed.

R. Sewell and *J. F. Pierce*, for defendant Hope.

J. T. Pingree, attorney for defendant Burt.

Mason, J. [After stating the facts as above.]—The question is here presented whether Hackley's appeal from the whole judgment stayed all proceedings on Burt's decree against Hope; if so, then the execution which Burt has caused to be issued thereon, must be set aside. The rule in chancery is, that no one can appeal from an order or decree who is not injured thereby, and even a party who is aggrieved by one branch of a decree does not thereby acquire a right to call in question another potion of the decree, which has no bearing or effect upon his rights or interests. Cuyler *v.* Moreland, 6 *Paige*, 273; Idley *v.* Bowen, 11 *Wend.* 227.

And, where a party has released all his interests in a suit, he has no right to appeal from an order or decree made therein which does not prejudice him, although it may be wrong as to other parties. Steele *v.* White, 2 *Paige*, 478. Hackley having transferred and released all his interest in the subject matter of the litigation to the defendant Hope, and there being no decree personally against Hackley for costs, or anything else, there is no ground upon which his appeal from the decree can by any contingency ever be successful. The defendant Hope, however, claims and insists that such appeal being perfected, and the proper undertaking to stay the judgment having been made by Hackley, it operates to stay all proceedings as to all parties, and that consequently Burt had no right to issue this execution against Hope.

This appeal of Hackley does not bring in review the decree which the defendant Burt has obtained against Hope; and this undertaking, which Hackley has given on his appeal, cannot, upon any just or reasonable construction of section 335 of the Code, be held to stay that judgment. The language of the section is: "If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant by at least two sureties, to the effect that, if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal." *Code of Pro.* § 335. This appeal of Hackley's cannot be regarded as an appeal from the judgment which Burt obtained against Hope, and consequently the undertaking of Hackley cannot reach it, and upon no construction should it be held to stay the execution thereof. If the two thousand dollars which Hope paid to Hackley was due him on a just accounting, the effect probably would be to diminish the funds in Hope's hands to be divided between him and Burt, and it would follow that Burt's decree against Hope is too large.

If this is so, Hope should have appealed therefrom, and then

it could have been corrected. Not having done so, he must suffer the consequences.

The order appealed from must be affirmed.

CLERKE, J., expressed the same views.

A majority of the judges concurred.

Order affirmed, with costs.

HALL *v.* THE CITY OF BUFFALO.

September, 1864.

Where the special duties of a comptroller of a municipal corporation are not defined by law, proof of his usage to receive and file notices affecting the indebtedness of the city is sufficient in an action against the conporation to cast on them the burden of proof that his duties did not include the subject in question.

One who had performed work for a municipal corporation under an agreement by which he was to be paid in orders on the general fund to be paid from the tax of a certain year, afterward, for valuable considerations, gave orders on the comptroller of the city to pay the former orders, when they should become due, to certain third persons; and the latter orders, so drawn by the contractor, were presented to the comptroller and filed in his office. *Held*, that they operated as assignments *pro tanto*, of the moneys due to the contractor, and being payable from a particular fund to arise at a future day, were not bills of exchange, and need not be accepted to make the drawee liable.*

It is not necessary that the city should have specific notice that the orders were given for valuable consideration. Knowledge of the fact that the orders had been given, is sufficient to put the city on inquiry.

The holders of the orders may resort in the first instance to the city, to enforce their demands, without proving that the maker of the orders has become insolvent; for the making of the orders is an assignment *pro tanto* of the claim against the city.

Joel Hall and five other persons brought this action against the city of Buffalo and Moses Baker, and seven others.

The following facts were found by the referee.

A city contractor, Moses Baker, in October, 1849, had made

* Cited on this point in Parker *v.* City of Syracuse 31 *N. Y.* 376.

with the city of Buffalo a contract to grade and fill certain market grounds, for which he was to paid in orders on the general fund of the city, to be paid from the tax of the year 1850. Baker, for a valuable consideration, from time to time drew and delivered to one Edwin Rose, orders on Cadwallader, the comptroller of the city, of one of which the following is a copy.

"Mr. Cadwallader, Comptroller:

"Please pay E. Rose or order $700, in orders on my contract for filling Elk street market grounds, when the same are drawn, and oblige, yours, &c., M. BAKER."

The several orders, soon after they were drawn, were left with the comptroller, and by him put on file and pinned to Baker's contract with the city. Afterward, Edwin Rose, for valuable considerations, drew sub-orders on the comptroller in favor of various persons, and among others, in favor of the present plaintiff, Hall; and these sub-orders were also delivered to the comptroller, and filed by him in his office, pinned to the contract between the city and Baker.

The city collected the assessment necessary to pay the contractor; and afterward and before the commencement of the action, the owners of several sub-orders drawn by Rose, demanded of the city of Buffalo the payment thereof and the requisite orders therefor, which were refused.

On November 14, 1851, Baker served on the comptroller a notice in writing, requiring him to take notice that he thereby countermanded all orders given by him to said Rose.

Prior to June 1, 1852, Baker's contract with the city was adjusted, the work accepted, and the common council passed a resolution directing an order to be drawn for the balance on the appropriate fund, for one thousand and three dollars and twenty-six cents in favor of Moses Baker, and such order was, pursuant thereto, drawn by the city clerk in favor of Moses Baker and delivered to the comptroller.

Afterward Moses Baker sued the city on the contract for said amount, and obtained a judgment therefor against the city, but Rose and the owners of the sub-orders were not made parties to that action.

It was customary in the comptroller's office when contracts

for work had been made in similar cases, to receive contractor's orders and sub-orders like those in question; and when orders were directed by the common council to be drawn pursuant to such contracts, to deliver them to the persons holding the contractor's orders therefor, and to divide them for that purpose.

On the refusal of the city to pay, this action was brought, all the holders of orders and sub-orders who would consent being made plaintiffs, and the rest being made defendants.

The relief demanded in this action was an adjudication of the rights and interests of the individual parties both plaintiff and defendant, in the fund alleged to be due from the city of Buffalo, and represented by the order drawn by authority of the common council in favor of Baker. The answer of the city of Buffalo denied, (1) that any such orders had been drawn by Baker; (2) that they had been accepted by the city; (3) that the assignments of the orders or interests set forth in the complaint had been executed. No other defense was set up.

A judgment was rendered in favor of the plaintiffs, from which the city of Buffalo appealed.

The court at general term affirmed the judgment, holding that the old usage of the comptroller's office as to the division of orders had nothing to do with the case. That the city, by not denying the allegation that there was a balance due Baker, admitted it, and stood in the position of fund holders between the several claimants, and should have paid the money into court and obtained an order that the claimants interplead. Also that the finding by the referee that Baker had obtained a judgment against the city, for the sum in question, which had been paid and satisfied, could not affect the case as presented by the pleadings, and that the pleadings could not then be amended.

From this judgment the city of Buffalo appealed.

H. S. Cutting, for defendants, appellants.

H. C. Day, for plaintiffs, respondents.

DENIO, Ch. J.—It is not surprising that the common council of the city should have declined the task of settling the

rights of the claimants to the moneys which Baker had earned, and should have preferred to cut the knot, which it had become difficult to untie, and by acting upon Baker's revocation of the orders which he had given, and paying the money directly to him. They seem to have made that election by directing a draft on the treasury, for the balance, to be given him. It is not apparent why the draft was not paid without a suit. If it was thought that a judgment in his favor would protect the city against the demands of the parties holding the orders, it was a mistake. If these parties had acquired claims on the funds which the city was bound to recognize, that obligation could not be discharged by any judgment resulting from a litigation to which they were not parties. The case therefore is the same as though they had voluntarily paid the money to Baker, in total disregard of the orders which he had given.

The evidence is quite satisfactory to charge the city with notice of the existence of these orders. They were actually lodged with the comptroller soon after they were drawn, and this was in pursuance of a practice prevailing in that office. The special duties of the comptroller are not prescribed by the charter, further than by declaring that any financial power or duty confided to any city officer may be vested exclusively in him. *L.* 1843, p. 120, § 12. This authority, together with the custom found by the referee, was sufficient, *prima facie*, to cast the *onus* upon the city of showing by their by-laws that his duties did not embrace the subject of the city indebtedness. A corporation consists of officers and agents, some of whom must represent the corporate body in such a sense as to render him a proper party to receive such a notice. Baker's revocation of the orders was served upon the comptroller, and as the common council acted upon that revocation, the presumption is inevitable that the revocation came to its knowledge, and as it presupposed the existence of orders, it was sufficient at least to put it upon inquiry. I do not say that what was done by the comptroller amounted to a contract with the holders of the orders, in the nature of an acceptance or engagement to pay them. It was sufficient to charge the city with notice of the orders and of their contents.

The question then is whether the orders, they having been

given for value, amounted to an assignment or appropriation of portions of the indebtedness which was accruing in Baker's favor against the city, to the benefit of the payees, respectively. I do not suppose that any privity of contract is established between the city and the holders of the orders. It is sufficient if these holders, by their transactions with Baker and the notice to the corporation, had acquired an equitable interest in the fund. If that be established, it follows that the city, as the holder of the fund, was the trustee of the parties interested in it, and could not equitably do anything to prejudice the interest of these parties. That the holders of the orders had acquired such an interest seems to me well established by authority. In Row *v.* Dawson, 1 *Ves. Sr.* 331, it appeared that one Gibson had lent money to parties under whom the defendant claimed, and gave them an order on Swinburne, the deputy of Horace Walpole, who was an officer of the exchequer, for the payment out of the moneys due to him from Walpole, out of the exchequer, of four hundred pounds to one of the persons, and two hundred pounds to the other, "value received." The question was whether the representatives of these persons were entitled to a specific lien upon the moneys due from the exchequer to the estate of Gibson, he having become a bankrupt, and it was held that they were entitled to such lien. Lord HARDWICKE said: "This draft, which amounts to an assignment, is deposited with the officer, Swinburne, and therefore is attached immediately upon it, so that Swinburne could not have paid the money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants, because he would have paid it with full notice of the assignment for a valuable consideration."

In Yeates *v.* Groves, 1 *Ves. Jr.* 280, the facts were that Dawson owed Yeates and Brown four hundred and fifty pounds, for which they held his note. By an arrangement between Dawson and Groves and Dickinson, the latter was to purchase a dwelling-house of Dawson. Yeates and Brown pressed Dawson for payment on the note, and he gave them an order on Groves and Dickinson for the amount of the note out of the purchase money of the house "for value received," and the note was given up. The order was not accepted, but Groves and Dick-

inson verbally agreed that when the purchase money was to be paid, Brown should receive notice to attend. Dawson afterward became bankrupt. Lord Chancellor THURLOW said: "This is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer he has done it; and, it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It is not an inchoate business. The order fixed the money the moment it was shown to Groves and Dickinson." And he made a decree accordingly.

Passing over a considerable period of time, we come to Lett *v.* Morris, 4 *Sim.* 607, where a builder, who was erecting a house under a contract, gave an order to one who had furnished him with lumber, for certain sums out of moneys which would become payable to him on the contract. It was held a good equitable assignment, and so much of these moneys as the orders called for was decreed to be paid to the holder of the order. See, also, to the same general purport, Burn *v.* Carvalho, 4 *Mylne & C.* 690; and Rodick *v.* Gandell, 15 *Eng. Law & Eq.* 22. In the first of these cases, Lord Chancellor COTTENHAM laid down the equitable principle in these words: "In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund." He quotes the dictum of Lord ELDON in *Exp.* South, 3 *Swanst.* 293, as follows: "It has been decided in bankruptcy that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, *it binds him.* On the other hand, this doctrine is brought into doubt by some decisions in the courts of law which require that the party receiving the order should in some way enter into a contract. That has been the course of their decisions; but it certainly is not the doctrine of this court." Lord COTTENHAM adds that "it is upon this principle that assignments of future freight, and of non-existing but expected funds, have been enforced in equity."

The principle of these cases has been adopted and frequently acted on in this country. 2 *Story Eq. Jur.* 1044; Peyton *v.*

Hallett, 1 *Cai.* 363; Weston *v.* Barker, 12 *Johns.* 276; Bradley *v.* Root, 5 *Paige,* 632; Morton v. Naylor, 1 *Hill,* 583. Many other cases of a similar character are referred to in those which have been cited. In Field *v.* Mayor, &c. of N. Y., 6 *N.Y.* 179, a similar question came before this court. One who had contracts with the corporation of the city of New York for printing, for a valuable consideration, assigned, to a party under whom the plaintiff claimed, his bills against the corporation, to the amount of one thousand five hundred dollars, to be paid after two prior assignments had been satisfied. The only notice given to the city was a letter to the comptroller, accompanied with a copy of the assignment. It was held that the assignment was a transfer enforceable in equity, and that the plaintiff was entitled to a decree against the city. See also Lowery *v.* Steward, 25 *N. Y.* 239.

The orders in these cases were not bills of exchange. They were payable out of a particular fund, and that fund was to arise and be made available subseqently to the drawing of the orders, and there is some doubt whether they could be considered as payable in money. The judgment which it is proposed to give will not be in any respect hostile to the cases which hold that the drawee of a proper bill is liable to the holder only upon an acceptance of the bill. Luff *v.* Pope, 5 *Hill,* 413, 417; Harris *v.* Clark, 3 *N. Y.* 93; Mandeville *v.* Welch, 5 *Wheat.* 277. The point decided in the last case was that the drawing, by a creditor, of a bill upon his debtor, in favor of a third person, with some other slight circumstances, did not amount to an assignment of the debt. Stress was laid by the counsel, who argued against the position, that it was an assignment, upon this circumstance, that the bill was general and not payable out of a particular fund. What was said by Judge STORY, in giving the reasons of the court, of the impossibility of dividing a demand by an assignment of a portion of it, was probably correct in the application which he made of the principle; but if it was intended to state that equity would not protect an assignment of a part of a demand, the dictum is hostile to nearly all the cases I have referred to, and especially to the one in this court which distinctly presented that feature.

The orders in this case were not expressed to be for value received, as in some of the cases cited. It was, however, proved and found that they were given for value. I do not think it was necessary for the city to have had specific notice of that circumstance. The drawing of the first class of orders, and the transfer by Rose of the interest which they were supposed to create, was sufficient evidence to put the city upon inquiry, and to show conclusively that Rose was not the mere agent of Baker. A proper inquiry would have disclosed the fact that they were given for a valuable consideration.

The appeal being on behalf of the city alone, no question is presented respecting the distribution of the money among the different claimants. The recovery was for the precise amount which the city would have owed Baker if he had not parted with his claim. The orders which he had given to Rose exceeded the whole balance in his favor. It cannot, therefore, be said that injustice has been done to the city, even should the disposition of the moneys be inaccurate, of which I have found no evidence.

It is objected that it was not proved that Baker was insolvent; and that is true, though this contest among his creditors leads to a strong inference that such was the fact. I do not see, however, that it was essential to establish that fact. If, as has been held, the drawing of the orders was a transfer *pro tanto* of the debt, the holders were entitled to resort in the first instance to the city to enforce their demands, and it would have been no answer for the city to say that they might have had a remedy against Baker.

It is readily seen that the principle which we feel bound to act upon may operate inconveniently upon parties owing demands of this character, by obliging them to arrange with several parties claiming under the one with whom they had contracted. But the same difficulty frequently arises where a creditor has parted, by formal transfers, with the whole or portions of the debt. The law affords the debtor a remedy in the nature of a suit of interpleader, so that it is his own fault if he pays to a person not entitled. If the rule would still operate inconveniently to municipal corporations, who are, perhaps, more exposed than others, to be embarrassed with conflicting claims, it

is for the legislature to protect them. They might also provide by express agreement that they should not be obliged to recognize derivative claims arising out of a contract for a public improvement.

I am in favor of affirming the judgment appealed from.

INGRAHAM, J.—The indebtedness of the city of Buffalo for the amount claimed by Baker as due him is admitted, it being alleged in the complaint and not denied in the answer. The only allegations denied in the answer of the appellants are; 1. As to the drawing of the orders by Baker; 2. The acceptance of the orders by the city; and 3. Whether the assignments of the orders set forth in the complaint were executed. The first and third of these defenses were proved on the trial, and were found by the referee against the defendants. I do not understand the appellants as insisting on these defenses. The only remaining one set up in the answer is as to the acceptance by the defendants of the orders, so as to bind the city to the payment.

The referee finds that Baker drew five orders on the comptroller in favor of Rose, for the sum, in all, of one thousand one hundred and eighty-nine dollars and seventy cents. That Rose delivered the orders to the comptroller, who annexed them to the contract of Baker. The amount due Rose was subsequeutly reduced somewhat by repayment. Afterward, the amount due Baker from the city was adjusted, and an order for that amount was directed by the council to be drawn in favor of Baker.

There can be no doubt that the assignees of such a claim might give notice of the assignment to them, and recover the same without an actual acceptance by the debtor of the order or promise to pay to the assignee. This was held in Morton *v.* Naylor, 1 *Hill*, 583. COWEN, J., says: "The order was an equitable assignment of the rent in question, with notice to Morton, who was bound to pay it according to the order, whether he had accepted or not." Wheeler *v.* Wheeler, 9 *Cow.* 34. Nor is it any objection to a recovery under such an order or assignment that it is not for the whole of the balance due. Taylor *v.* Bates, 5 *Cow.* 376; Pattison *v.* Hull, 9 *Id.* 747; Field *v.* Mayor, &c. of N. Y., 6 *N. Y.* 179. Whether there

was or not any valid defense in the matter relied on by the appellants, of a payment to Baker, is unnecessary to be decided in this action. No such defense was set up in the answer, and the appellants have no right to avail themselves of the findings of the referee which may have been necessary under the issues raised by the other defendants.

The objection that notice to the comptroller was not notice to the city of Buffalo is taken by the appellants. In Field *v.* Mayor, &c. of N. Y., *supra*, the same objection was taken and overruled. The court say the notice of the respondent's claims was served upon the comptroller while in his office, engaged in the duties thereof, and was beyond all doubt sufficient.

I think the judgment should be affirmed.

All the judges present concurred.

Judgment affirmed, with costs.

HALSTED *v.* McCHESNEY.

December, 1865.

Affirming 30 *Barb.* 34.

Plaintiff gave his bond to a third person for the benefit of his (plaintiff's) wife, and subsequently, on her death, was appointed her administrator. *Held*, in action by him, as administrator, to recover the bond, that he was entitled to its possession.

De Witt C. Halsted, administrator, &c., sued Jonas C. McChesney, in the supreme court, to compel the assignment to plaintiff of a bond for fifteen hundred dollars, or its cancellation, on the ground that it belonged to plaintiff's wife, the intestate, at her decease.

Eliza, daughter of defendant, intermarried with plaintiff, in March, 1849, and died in December, 1855, leaving a daughter, issue of the marriage.

The defendant, about five years after the marriage, gave plaintiff fifteen hundred dollars, as an advanced portion to his daughter, to be used in the purchase of a farm; upon agree-

ment that plaintiff should execute to his wife, his bond for the fifteen hundred dollars, it being intended to secure that sum to her. The bond was executed at the time of the transaction, and delivered to defendant for safe-keeping. About a year afterwards, upon the suggestion of defendant that a bond from husband to wife was not legal, the plaintiff executed a new bond, for the same amount, and of the same date, directly to the defendant, upon his promise to assign it to his daughter. After the death of his daughter, the defendant refused to assign the bond, or recognize it as belonging to her estate; and this action is brought to recover it by the plaintiff, as administrator of her estate.

Judgment was rendered for the delivery of the bond to plaintiff, and its cancellation, which was affirmed at general term, except as to the cancellation of said bond. The defendant appealed to this court.

D. L. Seymour, for defendant, appellant.

W. A. Beach, for plaintiff, respondent.

DAVIES, J. [After stating the facts.]—The plaintiff, as the administrator of the estate of his wife, was entitled, by virtue of his office, to take into his possession and receive all the personal estate belonging to his deceased wife at the time of her decease. As the judgment of the special term was modified by that of the general term, no question is presented in reference to the cancellation of the bond, or as to its future disposition. The only question presented is whether the plaintiff was entitled to take and receive the same. This court is concluded by the facts, as found in the primary tribunal. It is well settled that we cannot review these findings, and therefore our only duty is to ascertain whether the conclusions of law arrived at, founded upon them, are correct. As already observed, the administrator is entitled to take all the personal estate belonging to his wife at the time of her death. Patterson *v.* Ellis, 11 *Wend.* 259.

There would, therefore, seem to be but one fact to be ascertained, and that is, was this bond the property of Mrs. Halsted at the time of her death? This inquiry is answered by the first

finding of fact, by the court which tried the action, which is, that the bond in suit was the property of Mrs. Halsted in her lifetime. The court was asked to find the converse of this proposition by the counsel for the defendant, and expressly refused so to find. There was an exception to such finding, but such exception presents no question for the consideration of this court. Neither do the refusals to find certain facts which the defendant's counsel supposed were proven at the trial, and the exceptions to such refusals, present questions which this court can or will consider. We gave to this matter a very careful examination in the case of Cowing *v.* Greene, decided in this court in December, 1864. And we came to the conclusion that this court could not review either the findings of fact in the primary tribunal, or its refusals to find any facts which either party might claim to be established on the trial. We held that such matters belonged exclusively to the court in which the action was pending, and that, when the record was brought here, questions of that kind could not be raised for our determination. These views dispose of the whole case as made by the appellant, and it is clear that the judgment appealed from must be affirmed, with costs.

CAMPBELL, J.—An arrangement was made by which the plaintiff was to purchase a farm, and, to aid in such purchase, the father of plaintiff was to give to him the sum of one thousand dollars, and the defendant, the father of plaintiff's wife, was to give to her the sum of fifteen hundred dollars, which last mentioned sum was to be considered and treated as an advance to his daughter. The farm was purchased and the money paid according to agreement, and the defendant took from the plaintiff a bond direct to his wife, whereby the plaintiff promised and consented to pay to her the said sum of fifteen hundred dollars and interest thereon. Thus the agreement between all the parties was carried into complete effect. The money had then passed beyond the father's recall. The plaintiff's father had paid the portion which he had agreed to give to his son, the defendant had paid and advanced the portion which he had agreed to give to his daughter, the farm had been purchased, and the money invested in it for the joint benefit of the hus-

band and wife—the wife's interest being secured by the husband's bond to her, and thus the arrangement was carried into effect, and the agreement between the parties executed. It was a post-nuptial contract. There were good considerations of love and affection on all sides, and the money thus freely given under such an arrangement became as absolutely the property of the daughter as if it was hers by inheritance or by gift from a stranger. The father of the wife could no longer control it, and could not regain title except by some positive act on the part of the daughter—the mere fact that he retained possession of the bond, could give to him no title to the money it was given to secure the payment of to the daughter. When afterwards, on the suggestion to the plaintiff by the defendant that the bond held by the latter was not legal, and the collection of it could not be enforced, the plaintiff at once consented to give a new bond, and which was accordingly done, the plaintiff giving to the defendant the bond now in controversy, being a bond of same date as the first bond, but made payable to the defendant, and which was to be assigned to the wife on her request. If the money belonged to the wife, the giving of this new bond did not change or affect the title, except that it may be said to have made the defendant the trustee of an express trust, being a contract made with him in his name for the benefit of his daughter—the plaintiff's wife. The wife died leaving no will, and in her lifetime never sold or assigned this bond or the money it was intended to secure. If there was a trust it was then ended. That both she and her father erred as to the law, and supposed that by reason of the bond being given direct to the father, that the same belonged to him and could only become absolutely hers by assignment from him to her, is very probable. What she said was of no avail—she did nothing. The title to the money would not be changed by the expression of her opinion or of her wish that it should go back to her father.

It seems to me very clear that upon the undisputed evidence in this case, this bond belongs to the estate of the deceased wife, and the husband, as her administrator, is entitled to its possession and control.

If so, this judgment should be affirmed.

All the judges concurred except POTTER, J., absent.

Judgment affirmed, with costs.

HAMILTON *v.* GANYARD.

September, 1866.

Affirming 34 *Barb.* 204.

Under an agreement to deliver corn "in good merchantable *order*," the seller is bound to deliver corn of a merchantable *quality*.

It seems, that this is the meaning of such a stipulation; which should not be confined to condition, but extends to quality; but if this is not so, there is an implied warranty of quality in an executory agreement to sell, which is not excluded by a stipulation as to condition.*

William Hamilton, assignee of Smith & Mathews, sued Enos Ganyard, in the supreme court, for damages in not delivering the corn contracted for in the following agreement: "$50. Received from Smith & Mathews, $50, on account of my crop of corn now growing on about 30 acres of ground, to be delivered to them in Rochester, in good merchantable order, any time after the first day of January next, and before the first day of May next, at fifty cents per bushel of sixty pounds. Dated Rochester, August 26th, 1858. ENOS GANYARD."

Plaintiff gave evidence to the effect that between the dates fixed in the contract defendant tendered a load of corn, under the contract, to Smith & Mathews, which they objected was wet and muddy, and declined to receive it, on the ground that it was not of merchantable quality. The defendant's evidence was to the effect that it was well cured and dry. Only about one quarter of it, however, was well ripened; the rest was not sound. There was also a conflict of testimony as to whether "merchantable order" includes unripe corn if clean and dry.

The crop was about forty-five bushels, and the market price on May 1, about seventy-five cents.

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* Compare Rust *v.* Eckler, 41 *N. Y.* 488; Bartlett *v.* Hoppock, 34 *Id.* 118.

The judge instructed the jury, among other things, "that by the terms of the contract plaintiff was entitled to have the corn delivered in good merchantable order; and that merchantable order meant the kind of corn that was called so in market, and did not mean soft corn; that soft corn was not good merchantable corn, and that plaintiff was not bound to receive any corn except such as is described as good merchantable corn." To which defendant excepted.

Upon a verdict for plaintiff, judgment was entered.

The supreme court affirmed judgment, on the ground that the right claimed by defendant was to deliver the *whole* crop, three-fourths of which is conceded to have been of unmerchantable quality: tendering the good and bad together, was no tender or offer of performance, and the purchasers were not bound to receive the corn tendered, but might treat the contract as broken, and bring their action for damages sustained. Defendant appealed.

James L. Angle, for plaintiff, respondent;—Submitted the case, relying on Reed *v.* Randall, 29 *N. Y.* 358.

BY THE COURT.—J. C. SMITH, J.—The construction of the contract adopted at the circuit is correct. The defendant agreed to deliver his then growing crop of corn, at a future day, in good, merchantable order. The term "good, merchantable order," as thus used, necessarily implies that the corn was to be of merchantable quality. In other words, the parties expressly bargained for a merchantable commodity. See Reed *v.* Randall, above.

But if, as the defendant insisted in the court below, the terms used related merely to the condition of the corn, and did not include its quality, then this implies an agreement that the corn bargained for should be of merchantable quality, as the contract was what is called executory. A contract of that nature always carries an obligation on the part of the vendor that the article to be delivered shall be, at least, salable; at least of medium quality or goodness. 23 *Wend.* 350. Such implication is not repelled or limited, in the present case, by the express stipulation that the corn should be in merchantable order, if, as is

now assumed, that stipulation be held not to apply to the quality of the corn.

The single load of corn offered by the defendant was unmerchantable, and the plaintiff's assignors had a right to decline to receive it, as they did, on that ground. As the defendant subsequently declined to deliver the corn, because that load was not received, he was chargeable with a breach of the contract.

The measure of damages for such breach was the difference between the market value of the corn, at the time and place specified for its delivery, and the contract price, together with the sum paid by the purchaser, and interest thereon. That measure being applied, the evidence authorizes a recovery to the amount of the verdict.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs, and ten per cent. damages.

HARRIS *v.* THE AMERICAN BIBLE SOCIETY.

December, 1867.

Reversing in part 46 *Barb.* 470.

A corporation chartered for the purpose of receiving and holding in trust property committed to them by bequest, &c., in trust for an unincorporated association, with power to execute any trusts confided in them by such association, may take a fund bequeathed to them to be expended under the direction and for the appropriate uses of a committee of such association.—Per FULLERTON, J.

The provision of the *Laws of* 1860, 607,—that a testator leaving husband wife, child, or parent, shall not devise to benevolent, &c., societies more than one-half his estate, &c.,—is peremptory, and may be insisted on by any person who would derive a benefit therefrom, although not one of the relatives designated in the statute. And the one-half is to be computed with reference to the estate at the time of the testator's death.—Per FULLERTON, J.

Ellen Harris brought this action against Jeremiah Slaght

and others, the executors of Folkerd C. Sebring and his widow, and the American Bible Society, and three other corporations, asking that a partition of certain lands be made, the construction of a will, determined, and for general relief.

The facts material to the questions in this court were these:

Cornelius Sebring died before the enactment of the Revised Statutes, which dispensed with the necessity of words of inheritance to pass a fee. He left two sons and four daughters, and his will contained the following provision: "I give and bequeath my son Folkherd, 30 acres of land on which he now lives, * * * and one-sixth part of my personal property not otherwise disposed of." The land referred to was in this State.

Folkherd entered and enjoyed the land devised, until his death, in 1861. He died without issue, but leaving a widow, and left a will, by which, 1, he devised and bequeathed to her the use of all his property, real and personal, for life. 2. He directed that after her death it be sold, and the proceeds paid "to the following named charitable societies, in four equal portions—that is to say: I will and bequeath one fourth of all such proceeds to my executors in trust, to be paid over to the treasurer of the American Board of Commissioners for Foreign Missions, or the person or persons authorized by said board to receive the same, expressly for them, and to apply it to the charitable uses and purposes of said board.

"I further will and bequeath to my executors in trust another fourth part, &c., ... to be paid over by them to the trustees of the Presbyterian House, incorporated April 21, 1855, by the legislature of Pennsylvania, to be expended under the direction and for the appropriate uses of the Home Mission Committee of the General Assembly of the Presbyterian Church in the United States of America." The other two fourths he gave to the American Bible and Tract Societies.

The plaintiff was a surviving daughter of Cornelius Sebring, and brought this action, joining the other heirs of Cornelius, and the societies, and claimed that under the will of Cornelius, Folkherd took only a life estate; also, that the interest which vested in him as heir would not pass by his own will, because its dispositions were void by reason of the statute cited in the opinion, forbidding one leaving a family, &c., from devising

more than one-half his estate for benevolent, &c., purposes; and also, because of uncertainty, and because the societies were not competent to take.

The act of the legislature of Pennsylvania, referred to in the will, after reciting that the General Assembly of the Presbyterian Church had appointed John A. Brown and others named "Trustees of the Presbyterian House," and had recommended that an act of incorporation should be obtained, and should contain a general provision authorizing the said trustees to hold in trust for said assembly, any property committed to them by donations, bequests, or otherwise, created those persons and their successors a corporate body, by the name of the "Trustees of the Presbyterian House," with the usual powers.

Section 4 declared, "that the trustees hereby incorporated, and their successors, shall be subject to the direction of the said assembly and their successors, have full power to manage all funds, property and effects committed to their care, by gift, purchase, bequest or otherwise, and to execute any trusts confided to them by the said general assembly, as [or] their successors, in such manner as shall be deemed most advantageous, and not contrary to law or the intention of the donor or testator."

The judge before whom the cause was tried held that Folkherd took a fee under Cornelius' will; that only the widow could interpose the statute; and that the gift of proceeds to the societies must be deemed a gift of personalty, and that the societies were competent to take. He accordingly dismissed the complaint.

The supreme court, at general term, on an appeal taken by the plaintiff, held: 1. That in the will of Cornelius,—by the introductory words, by the absence of a residuary clause, and by the gift of real and personal property in the same clause and by the same words, and by the existence in the same will of a devise of the homestead to another son, with a share of the personal estate, couched in the same language,—the testator's intent to pass a fee was apparent; citing Charter *v.* Otis, 41 *Barb.* 525. 2. That the gifts to the societies were of proceeds—that is, personalty, and not land, and that the direction as to the sale was valid as a power in trust; that the act of 1860 rested, not

on the protection to be given to families, but on public policy respecting corporations, and might be interposed by any party interested in the estate, and that therefore the bequests to the four societies were valid to the extent only of one-half of the property so bequeathed to each. The court accordingly decreed, that after the death of Folkherd's widow, the whole of his real and personal estate be converted into money, and after paying to the plaintiff, the executors, and the four corporations, their costs of this action, one-eighth part of the net proceeds be paid to each of the four corporations. And distribution of the residue of the proceeds was directed among the individual defendants who are descendants of Cornelius Sebring. (Reported as Harris *v.* Slaght, 46 *Barb.* 470.)

The plaintiff appealed from the adjudication on the construction of Cornelius' will, and that the Presbyterian House was entitled to take, and from the award of costs to the defendants.

The four corporations appealed from the adjudication that they could not take each one-fourth, and also from the direction concerning costs.

John E. Seely, for the plaintiff.

Samuel A. Foot, for the American Bible Society.

George A. Titus, for the American Tract Society.

FULLERTON, J.—[The remarks of the learned judge on the effect of the devise to Folkherd in the will of Cornelius, we omit, as the court did not concur in them.]

2. The beneficiaries contemplated by the third clause of Folkherd C. Sebring's will are plainly therein designated as four "societies." The ultimate and real beneficiary, under the direction to pay over to "the Trustees of the Presbyterian House," is not that corporate entity, nor the individual persons composing it, but some "society."

By turning to the Pennsylvania statute referred to by the will, and reading it as if incorporated with the will (21 *N. Y.* 330, 331), we find that the "society" for whose benefit this direction is given is the whole mass of persons constituting the

Presbyterian Church in this country, or their General Assembly, viewed as a continuous body, or a particular session of that assembly which met in Philadelphia in 1854, or a certain committee of such General Assembly, viewing the latter in one or other of the aspects just specified. The will gives this committee's title as "The Home Mission Committee."

None of these bodies are incorporated; and it may be assumed that a direct bequest to any of them, or to any individual for their use, in the general form in which they are referred to by this will as beneficiaries, would be void for uncertainty.

But it is further contended, that although the bequest is to a corporate body, it is still void because the beneficiaries are thus undefined, and are not themselves incorporated.

It is asserted that the corporation has no interest, and is a mere conduit-pipe, through which the money is to flow into the hands of the ultimate beneficiaries.

This is not exactly the fact. By the will, the fund is to be "expended" under the *direction* of the beneficiaries. This implies the very reverse of a simple payment over to the latter.

By the act, this corporation is to "manage" all funds thus coming to its hands. This, to be sure, must be done "subject to the direction of the general assembly, or their successors."

In both these respects the will and the act substantially correspond. The latter, it is true, enjoins upon the assembly the practice of issuing its directions to the corporation through a certain specified committee of its body; and perhaps it also requires the assembly to devote this portion of its funds to uses supervised by that same committee. The corporate body, however, is to be the managing and the disbursing trustee of the bequeathed fund.

As a corporate entity, it is to hold the custody thereof and the legal title thereto.

Both in respect to real and personal property, it is established doctrine, that a trustee to receive, manage, and disburse, or even with less powers, has the legal title, and is, in contemplation of law, the owner of the property. It must, however, be conceded that the corporate body, and the corporators, were without any actual right to any beneficial enjoyment; they merely sustain a burden for the enjoyment of the society refer-

red to. But it seems to me that the absence of such right in the corporation, or its corporators, is not material; for such is the condition of most charitable corporations.

The beneficiaries of funds held by incorporated hospitals are persons not entitled to membership in the corporations. And it rarely happens that in such hospitals the corporate body, or any individual member thereof, has any beneficial interest. The fact appearing in this case that the corporation must, in all substantial respects, obey the orders of the unincorporated and fluctuating multitude for whose use it was created, or the orders of the committee thereof, can have no influence on the validity of the bequest.

Ordinary corporate bodies having charge of the temporalities of our churches are very nearly in this condition; and if they were absolutely and entirely in it—that is to say, if the trustees were forbidden to disburse a dollar without asking the directions of a mass meeting of those who, for the time being, might chance to be attending worshippers—the corporate body would not the less satisfy the requisites of our law concerning gifts to charities, in the particulars now under consideration. The objections to the capacity of this corporation to receive the testator's intended bequest, seem to me, therefore, to be unfounded.

They originate in conceptions impracticably refined and subtle.

Such rigorous constructions are not adapted to the actual concerns of life. The cases cited have been examined, as also the learned and elaborate opinion of the present Chief Judge (DAVIES) in Downing *v.* Marshall (reported in 23 *How. Pr.* 10). The plaintiff virtually admits every proposition required to support the bequest to "The Presbyterian House," except what may be involved in the nice criticism referred to, and that is not, in my judgment, supported by anything found in these citations.

3. The act relating to wills (*L.* 1860, p. 607) enacts that "No person having a husband, wife child, or parent, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary societies, association, or corporation, in trust, or otherwise,

more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)."

The testator left no relative or connection named in this act, except a wife; and she consented to the disposition.

The societies contend that the act was made exclusively for the benefit of the persons referred to by it, and that no others can insist upon the prohibition, or claim its enforcement.

The general term held, and I think, correctly, that the prohibition is peremptory, and may be insisted on by any person who would derive a benefit therefrom.

The language is absolute; and if the courts have power in any such case to judge concerning the probable motives of the legislature, and may imply, accordingly, an exception to the positive terms of a statute (on which no opinion need now be expressed), I am unable to discover any safe ground for such a proceeding in this instance.

Consistently with this act, a testator, having the relatives and connections specified, may give half of his estate to a nephew or any remote collateral relative, or, indeed, to entire strangers, and give the other half to the societies described.

It is, therefore, quite clear that it was not designed to compel testators to provide for their families. If a man whose entire estate consisted in realty, and who had none of the relatives mentioned, and only a wife, should die without a will, his widow would only take a life estate in one-third of his lands.

Yet, in such a case the statute of 1860 avoids the devises which such a person might have made, to a much greater extent than is necessary to protect all benefit which the widow could possibly have derived from an intestacy.

The widow may have been barred of dower by a jointure. 1 *R. S.* 741, §§ 9, 10, 1 ed. She may have been incompetent to take from alienism; yet, in either of these cases, if the construction claimed be correct, her consent alone would give effect to a devise not otherwise sustainable.

So to hold would not be implying an exception from the nature and reason of the thing. 1 *Johns. Cas.* 131.

It would be repugnant to both, and violative of our plain duty, to administer the law as we find it written.

The reasons assigned by Judge T. A. JOHNSON in support of the judgment below on this point, are satisfactory and conclusive. Harris *v.* Slaght, 46 *Barb.* 470.

4. The enactment in question is, that no person shall "by will or testament give or bequeath" to any society of the classes named, "more than one-half part of his or her estate after payment of his or her debts."

As the parties concur, and perhaps, rightly, in construing this act as prohibiting dispositions to these purposes, by the same testator, which taken together, exceed one-half of his entire estate, I will assume that such is the law. No doubt it was the legislative intent.

The supreme court determined that the societies can take only one-half of the proceeds which may be realized on a sale of the estate at the widow's death.

On this a question arises whether the statute, in speaking of one-half of the testator's estate, is not to be regarded as referring to the estate left at the testator's death.

Upon the words and the reason of the thing, the affirmative is quite clear. No higher authority can be found; nor does a resort to precedents seem needful on a point so plain.

If a man leaving two infant children should give each an estate for life, with remainder in fee to his issue, should limit cross-remainders in default of issue, and make an ulterior disposition for a sale, and the payment of proceeds to charitable societies on failure of issue living at the survivor's death, the judgment below assumes that, on the occurrence of the latter contingency, the societies could only take one-half of the value at that time.

Nearly or quite a century might have elapsed, and, owing to depreciation or other causes, the proceeds might not amount to one-tenth of what was the value at the testator's death. Yet it is supposed that one-half of this diminished fund should go as upon an intestacy to the next of kin. I do not think so.

The Roman *lex falcidia* forbade a testator to give more in legacies than three-fourths of his effects; so that there must remain to the heir one-fourth. (*Justinian Inst.* book 2, c. 22; see Cooper's ed. p. 173; see the law itself in the Digest, lib. 35, tit. 2, l. 1.)

Like the act now under consideration, this law does not, in terms, specify any time for the valuation.

But, commenting upon it, the *Institute* speaks as follows:—

"The law *falcidia* looks to the quantity of his estate at the time of the death of the testator; and therefore, if he who is worth but an hundred aurei at his decease, bequeath them all in legacies, the legatees must suffer a defalcation; for they will be entitled to no advantage, although the inheritance, after the death of the testator, and before it is entered upon, should so increase by the acquisition of slaves, the children of female slaves, or the product of cattle, that after a full payment of the 100 aurei in legacies an entire fourth of the whole estate might remain to the heir; the legacies, notwithstanding, would still be liable to a deduction of one-fourth.

"On the contrary, if the same testator had bequeathed only 75 aurei, then, although, before the entrance of the heir, the estate should be so decreased by fire, shipwreck, or the loss of slaves, that its whole value should not be more than 75 aurei, or less, yet the legacies would still be due without defalcation." (*Justinian Inst.* book 2, c. 22, § 2; see Cooper's ed. p. 174, and also the editor's note on this § 2, at page 533.)

In SANDER'S *Institutes of Justinian* (p. 336, 3 ed. 1865), it is said that "the calculation under the *lex falcidia* was made at the time of the testator's death."

The subject is treated of to the same effect, and with great fullness and detail, by DOMAT (*Domat Civil Law*, part 2, book 4, title 3, § 1, articles 3706, 3707, 3708; see Boston ed. 1850, edited by CUSHING, vol. 2, 588).

When a testator disposes of his property in such a manner that one-half of the corpus can be severed from the other at his death, the administration under the statute of 1860 is very simple. But if (as he may) he devise it by way of successive estates, or interests, the task of distribution between his next of kin and the charitable societies to whom he has bequeathed in excess of his powers may be somewhat more difficult. Still it is not impracticable.

It should be adjudged that the four societies will not be entitled to receive a greater sum in the whole, from the proceeds of the sale directed by Folkerd C. Sebring's will than would be

sufficient, on a proper calculation, to pay and satisfy at that time a debt then yet remaining unpaid, which, at the testator's death, was equal in amount to the then value of one-half of the testator's estate, over and above his debts.

And also, if there should be any residue of such proceeds, the costs awarded in the court below be paid out of the same; and the balance thereof distributed to the next of kin of the said testator, in the proportions specified in the judgment of the general term.

With these modifications, the judgment appealed from should be affirmed.

These are my views of this case, and my brethren concur in them, with this exception:

They are of opinion that the case of Van Derzee *v.* Van Derzee, 36 *N. Y.* 231, controls, and requires a decision that Folkerd C. Sebring took a life estate only.

I am unable to acquiesce in that conclusion. But it follows that the judgment of the general term, so far as it holds that Folkerd took a fee, must be reversed; and that with the modifying adjudication above suggested, the judgment must be in all other respects affirmed.

None of the parties are to have costs on this appeal, and the proceedings are remitted to the supreme court, with directions to enter judgment accordingly.

HUNT, J., read a memorandum of opinion, to the effect that the will of Cornelius passed only a life estate, and in this a majority of the court concurred.

Judgment reversed, and judgment that Folkerd Sebring took only a life estate in the thirty acres mentioned, and that on his death the same descended as in case of the intestacy of his father to the heirs at law of his father. Action remitted for proceedings accordingly. No costs allowed on this appeal.

HARRIS *v.* RATHBUN.

March, 1866.

A contract to saw logs into specified sizes of lumber, in good and workmanlike manner, and to take and pay for all that the sawyer spoils in sawing, requires him to take and pay for only what is rendered unmarketable.

Spoiled lumber does not include what is merely sawed smaller than called for by the contract.

Evidence of general usage is admissible, in such a case, to explain the term "spoiled lumber," if it can be deemed ambiguous.

In an action by a sawyer to recover the contract price agreed to be paid for sawing lumber in a workmanlike manner, the employer may recoup damages for unworkmanlike sawing, although he has received the lumber, if he objected, at the time of receiving it, that the work was not well done.

Where the performance of work to be done is to precede payment, and is a condition thereof, the contractor, having substantially failed to perform on his part, cannot recover for his labor and materials, notwithstanding the owner has chosen to enjoy the benefit of the work done.*

William Harris sued Isaac Rathbun, to recover a balance due upon a contract.

The plaintiff and defendant were lumbermen; the former engaged in manufacturing, and the latter in furnishing logs to be manufactured into lumber, and then selling it. In January, 1857, they made a written contract, by which plaintiff was to saw into lumber for defendant all the logs that the latter should draw to his mill for one year to come; to saw the same into such lumber as defendant should from time to time direct; and, "to saw it in a good, workmanlike manner, and to take pains and saw all the clear stuff, select box, that can be got out of the logs, and to saw all the bark from the edge board, and what is sawed into inch is to be sawed plump inch, and if said party of the first part [the plaintiff] shall *spoil* any lumber, he is to take it, and pay the party of the second part [the defendant] what he shall get for the remainder, deducting the drawing per 1,000 feet therefrom."

* Compare Walker v. Millard, 29 *N. Y.* 375.

A part of the price for sawing was to be paid as the work progressed, and the remainder (for which this action was brought), after the work was finished. The plaintiff sawed, under the contract, all the logs furnished by defendant, into lumber, and the defendant accepted the lumber, drew it away, and sold it.

The referee, whose rulings are sufficiently stated in the opinion of MORGAN, J., reported in favor of plaintiff, and judgment was entered, and affirmed at general term. The defendant appealed.

D. Rumsey, for defendant, appellant.

A. P. Ferris, for plaintiff, respondent.

MORGAN, J.—The defendant claimed that he was entitled to damages, because the plaintiff had not sawed his lumber in a good and workmanlike manner. The case concedes that the defendant received the lumber without rejecting any part of it, although the contract stipulated that, if the plaintiff spoiled any of the lumber in sawing it, he was to take it and pay for it at a price agreed upon between the parties.

The defendant, however, offered to prove that the lumber was not sawed in a good and workmanlike manner. This offer was objected to on the ground that the contract designated all lumber not sawed in a good and workmanlike manner as spoiled lumber. The referee sustained the objection and excluded the evidence. The defendant then offered to prove that, when he took the lumber away, the parties disagreed in respect to the quality of the sawing, the defendant contending that it was not sawed in a good and workmanlike manner, and the plaintiff insisting that it was. This evidence was overruled. The defendant then proposed to show that, among lumbermen, *spoiled* lumber is that which is rendered unmarketable. This evidence was likewise rejected.

It is argued by the plaintiff's counsel that *spoiled* lumber was defined by the contract to include all such as was not well sawed according to the specifications of the contract. The contract required the plaintiff to "saw it in a good and workman-

like manner, and to take pains and saw all the clean stuff, select box, that could be got out of the logs, and to saw all the bark from the edge board, and what was sawed into inch was to be sawed *plump* inch." It further provided that, if the plaintiff should *spoil* any lumber, he should retain it and allow a specified price. I am unable to appreciate the position taken by the plaintiff, that by the terms of the contract, lumber not sawed according to these specifications was *spoiled* lumber. I should infer, from the known and acknowledged signification of the word, that, by *spoiled* lumber, it was only intended to include such as was rendered unfit for market. I think we may assume that there are different grades of lumber in the market, and that its quality may depend, in a considerable degree, upon the manner in which it is sawed.

The contract plainly implies that certain logs which might be suitable for clear stuff, select box, might be wasted, or sawed into a second or inferior quality of lumber, but which would nevertheless be marketable, and could not by any sensible interpretation of the contract be included among lumber that was spoiled. This was what the defendant proposed to prove by the custom of merchants, but which I think was properly overruled; and I agree with the plaintiff's counsel that the contract was unambiguous, and did not require extraneous evidence to interpret its meaning; while I am clearly of opinion that he is wrong in his interpretation of it.

If, however, the words admit of two interpretations, and if it had acquired a technical meaning among lumbermen when applied to the trade or business of manufacturing logs into lumber, it was competent for the defendant to prove the general custom in order to fix its meaning in the contract. Evidence of general usage in the trade to which the contract refers is admissible to give a particular sense to the words employed, as the parties may be presumed to have contracted in conformity with the custom, and to have used the word in the customary trade acceptation. *Add. on Cont.* 854; Dawson *v.* Kittle, 4 *Hill*, 107.

The offer was not as broad as it should have been, for it did not propose to prove a *general* custom. It does not, however, appear that the offer was overruled for this reason. But it is the business of counsel to make the offer sufficiently broad to

justify the evidence. If the question turned upon this exception, it would, perhaps, be difficult to sustain it, as the offer was not sufficiently comprehensive.

The principal question is, whether the referee erred in overruling the defendant's offer to prove that the lumber was not sawed in a good, workmanlike manner. The offer does not specify wherein the plaintiff failed to comply with the regulations of the contract. I was at first inclined to the opinion that the offer was too general and indefinite to sustain an exception; but as the referee excluded it upon another ground which could not be obviated by making it more specific, I think the exception is sufficient to raise the question.

It will be seen that the defendant was the owner of the logs, and employed the plaintiff to manufacture them into lumber. The law would perhaps imply that he was to do it in a good and workmanlike manner, but the contract goes further, and specifies several particulars as to the manner in which the work was to be done. It is apparent that the parties themselves defined what should be considered good workmanship; and if the offer had not been excluded, it may be presumed that he might have proved some of the allegations contained in his answer; among which is one, "that a large portion of said logs that would have made clear stuff or select box boards, were wasted in the sawing thereof." Another allegation was, that portions were left with the bark on the edge, and a portion intended to be sawed inch stuff was not sawed plump inch, a part thereof being over, and another part less than an inch. It is very probable that these allegations of the answer could not have been sustained by proof to any considerable extent; but I do not think we are at liberty to say that the defendant could not have proved some of them, so as to lay the foundation for damages.

The ground upon which the rejection of this evidence is maintained by the plaintiff is, that the defendant, by receiving the lumber, waived his claim for damages. This ground of objection should be considered in connection with the defendant's offer to show that he objected to the workmanship when he took the lumber. In this view of the case, I think it cannot be said that there was any intention to waive his claim for

damages. The plaintiff's counsel relies upon the authority of Reed *v.* Randall (29 *N. Y.* 358), and kindred cases. Conceding that case was rightly decided, it does not authorize the application of the doctrine of waiver in a case like this; for here the defendant had no option to refuse any lumber, except such as was spoiled, not such as was sawed into inferior qualities. In executory sales of property, the purchaser is at liberty to reject or to return the article, if it does not answer the contract.

The only doubt I have of the correctness of the principle, decided in Reed *v.* Randall, is, that it may operate to deprive a purchaser of the benefit of his contract. It requires him to reject the article which may be worth much more to him than he contracted to give for it, or else to lose his claim to damages. But that case cannot be invoked as an authority for refusing damages in a case where one man employs another to saw his lumber or to build him a house. The owner has no right of election in such a case upon which to predicate a waiver of damages for non-performance of the contract according to its terms.

In my opinion the judgment should be reversed, and a new trial granted.

HUNT, J. [After stating the facts]—On the trial, the plaintiff proved that he had sawed for the defendant under the contract, one hundred and sixty-five thousand and ninety to one hundred and eighty-seven thousand feet of lumber. It was admitted that the defendant took possession of the lumber and drew it away from the mill and disposed of it.

The defendant then offered to prove that the lumber was not sawed in a good and workmanlike manner, as required by the contract. This was objected to, on the ground that the contract provides that if the plaintiff spoils any lumber he is to take it and pay the defendant for it; that all lumber not sawed according to the contract is to be deemed spoiled lumber; and that it was the duty of the defendant to have offered it to the plaintiff, and that he should have refused to accept it, before the present defence would be available. The referee so held, and excluded the evidence.

As I construe the contract, it contains distinct clauses on this head. First. That Harris will saw the logs into such lumber as Rathbun shall direct. This I assume to include width and thickness, and it is in legal effect the same as if Rathbun had stipulated in writing that one-third thereof should be ten inches wide and one and a half inches thick, and the residue one-half thereof to be one inch thick; the remaining portion to be three-quarters of an inch thick, or of any other specific dimensions. Second. Harris agrees to saw all this "in a good workmanlike manner;" in other words, the sawing shall be of the smooth and even character belonging to a steam mill, rather than a water mill. The ends shall be perfectly trimmed; the same board shall not be thicker or wider at one end than the other. Third. He agrees to saw all the clear stuff select box, that can be got out of the logs. By clear stuff is supposed to be meant boards having neither knots, decay or shakiness in them; and this he agrees to saw into a character of lumber called select box boards. Fourth. He is to saw all the bark from the edge board, and what is sawed into inch boards is to be plump inch thick. Last. He agrees that if he spoils any lumber, or if he renders it of no value in any form or class, he will keep it, and will pay to Rathbun its value.

The plaintiff in his next objection refused to allow the referee to be informed as to the meaning of the term "spoiled lumber," and this court was thereby also deprived of the light to be afforded by that information. We must, therefore, act upon our own intelligence on the subject.

Lumber is useful, and more or less valuable, in all its conditions, whether in the shape of slabs—its least valuable form of manufacture—or in that of select clear stuff boards, or in the form of square timber. Boards of the thickness of one inch and a quarter, which will make them of one inch thickness when dressed, are more valuable than those of one inch merely, and these again are more valuable than those being merely three-quarters of an inch in thickness. I cannot think, however, that if a board is but three-quarters of an inch in thickness, when with proper care it might have been made an inch thick, the board is thereby spoiled. It is certainly spoiled as an inch and a quarter board, but it has a market value as a board of

a less dimension. A board which is not a plump inch thick is valuable as a board of the next lower degree. A board that has a wany edge is not a handsome well-dressed article of the highest class, but the passage through it of a circular saw, at a trifling expense, would completely restore it; and I cannot think the bark upon the edge can be said to have spoiled the board. The butts may not be properly cut off the boards; the sawing may be rough and uneven; the boards may be dirty and weather-stained; they may have bark or wane upon the edges; but they are not thereby rendered valueless.

I think there is in this distinct contract, an agreement by Harris that if he spoils or entirely destroys any of the lumber —renders it of no value in any class or grade—he will keep it and pay its value, and that it also contains in express terms the ordinary agreement to perform his business in a workmanlike manner, for the breach of which he is liable in damages.

In an action now brought by the sawyer to recover the price agreed to be paid for the sawing, the other party having taken away the lumber, objecting, at the time, that it was not sawed in a workmanlike manner, can the objection be made that the work was not well done, and a recoupment of damages be made?

The plaintiff rested his objection upon the specific ground that, if not sawed according to the contract, the lumber was to be deemed spoiled lumber, and to be kept by the plaintiff, and did not object that the lumber had been received by the defendant, and that he was thereby precluded from finding fault with it. I have endeavored to show the unsoundness of this proposition.

That the defendant did not intend to waive a complete performance, but that when the lumber was removed he complained that the work was not well done, is to be assumed as a fact in determining the present question. The next offer of the defendant was to show such complaint on his part.

The case comes within Smith v. Brady, 17 *N. Y.* 173, which holds that where work is to be done, and performance is to precede payment, and is the condition thereof, the party doing the work having failed substantially to perform on his part can recover nothing for his labor or his materials, notwithstanding

the other party has chosen to occupy and enjoy the erection. See also Ellis *v.* Hamlen, 3 *Taunt.* 52; Champlin *v.* Rowley, 13 *Wend.* 258; S. C., 18 *Id.* 187.

The case of Reed *v.* Randall, 29 *N. Y.* 358, was of a different character.* That was not a case of work to be done or services rendered, whose performance was to precede payment, but of the sale and delivery of property contracted for at a specified price, received by the vendee without objection, and no complaint made for several months.

I think there should be a new trial.

A majority of the judges concurred.

WRIGHT, J. (dissenting), expressed an opinion to the effect that by the provisions of the contract, the plaintiff was to take and pay for the lumber "*spoiled*," and all not sawed according to the contract was within that description; that the defendant could not accept, remove and dispose of the lumber, and afterwards insist that the sawing was not done according to contract, and claim damages on that ground; as his right to such damages did not survive the acceptance of the lumber by him.

Judgment reversed, and new trial ordered, costs to abide the event.

HARTLEY *v.* TATHAM.

September, 1864.

Modifying 1 *Robt.* 246.

A creditor by mortgage who elects to make the whole principal due, for an alleged default in the interest, is not bound by the election, if the existence of a default is disproved; and hence a tender of the whole amount in such a case, does not, though refused, extinguish the lien of the mortgage.

* The difference between the members of the court in that case was on the question, to which of two classes of cases the one before the court properly belonged; whether a sale with express warranty, or an executory contract of sale of goods to be of a specified or merchantable quality, but which on delivery were accompanied by no express warranty. Rust *v.* Eckler, 41 *N. Y.* 488.

Hartley v. Tatham.

One holding an executory contract for the sale to him of land subject to a mortgage, rendered services to the mortgagee upon an agreement that they were to be received as payment of their value on the mortgage. *Held*, that a grantee of the land, having also an assignment of the claim for the value of the services, was entitled to the benefit of the application of the amount on the mortgage, as against a subsequent assignee of the mortgage.*

A grantee who takes a deed expressed to be subject to a mortgage is not estopped thereby from showing that a part of the mortgage has been paid.†

Joseph W. Hartley brought this action, in the New York superior court, against Benjamin Tatham and wife, and others, to foreclose a mortgage on land.

One Cunningham made the mortgage to Dunscomb, May 30, 1860, to secure fifteen hundred dollars. June 1, Cunningham conveyed the land to one Smith, subject to the mortgage, which Smith, by the terms of the conveyance, agreed to pay. January 26, 1862, Smith conveyed the land to defendant, Tatham, subject to the mortgage; but this conveyance contained no assumption of the mortgage nor any agreement by Tatham to pay it.

Before the mortgage was made, Dunscomb, who then owned this land and adjoining lots, made an executory contract for the sale of all the land to one Higginson, who by the contract agreed to erect houses thereon; and before the mortgage was made Higginson assigned this contract, with Dunscomb's consent, to one Arment, a plumber engaged at work upon the houses, and Dunscomb agreed to convey the premises to Arment when the plumbing work was finished. After Dunscomb had conveyed the premises to Cunningham, taking back the mortgage in suit to secure a portion of the purchase money, he employed Arment to do other work for him, and agreed to apply the price thereof by deducting the amount from the mortgage which he at that time held. This work was done, and Dunscomb and Arment liquidated the price at four hundred and ninety dollars and three cents.

Arment, instead of taking a conveyance of the property to

* Compare Prouty v. Price, 50 *Barb.* 344.

† See Binsse v. Paige, vol. 1, p. 138, of this series.

himself, procured Cunningham to convey it through Smith to Tatham, as above stated; and, pursuant to an agreement made at the time of those conveyances, assigned to Tatham, May 3, 1862, his claim against Dunscomb for the price of the work, and which was to be applied to the mortgage then held by Dunscomb.

Afterward, and on May 13, 1862, Dunscomb assigned the mortgage to plaintiff, without notice of the credit agreed on, and plaintiff, on June 16, 1862, commenced this suit to foreclose for the whole amount due, for default in payment of interest. Defendant, on July 9, 1862, tendered principal, interest and costs, less the amount of the demand, which he claimed to be applicable in payment. This tender plaintiff refused. The first decision of the court below is reported in 10 *Bosw.* 273. After a second trial the defendants had judgment.

The superior court affirmed the judgment, on the ground that the demand was applicable to the mortgage; that, as it more than paid the interest, there was no default; and that as a tender of all that was due had been refused, the lien of the mortgage was gone. Their decision is reported in 1 *Robt.* 246.

D. M. Porter, for plaintiff, appellant.

A. Clarke, for defendants, respondents.

By the Court.—Denio, Ch. J.—I assent to the conclusion of the superior court that the four hundred and ninety dollars and three cents ought to be allowed as a payment on account of the interest due, and so much of the principal as it would extinguish. It follows from this conclusion, that there was no interest in arrear when the action was commenced, and hence, also, that the plaintiff had no right to elect to consider the whole principal immediately payable. The complaint does indeed set forth such an election, but it was based upon the actual denial of the payment, and upon the allegation that a year's interest was in arrears. The plaintiff's case was that the whole principal and interest had become payable in consequence of the default in the payment of the interest. When it was determined that there was no interest in arrear, the case

made by the complaint was disproved, and there was then no foundation for the claim of the whole under the special clause in the bond and mortgage. I think, therefore, the defendant had no right to tender the whole principal without admitting a default in the payment of interest. It was an offer which the plaintiff was at liberty to reject or to accept. He rejected it, as he had a right to do. As the debtor was not bound by the election of the creditor, because the fact which authorized that election had not arisen, so the plaintiff ought not to be bound by it, because he has failed to establish the existence of the fact which alone gave him the right to make any election, and upon which alone he claimed that right. It is not like the case where one who is entitled to an advantage proposes to waive it and the other party acts upon the waiver—there the person making the offer ought to be bound by it. The plaintiff here claimed the whole fifteen hundred dollars of principal and the entire interest of that sum from the date of the mortgage, grounding that claim upon the alleged default in paying interest. If the defendant had acceded to this view, and had paid or tendered the whole principal and interest, the plaintiff might have been obliged to take it, and his refusal of a full tender would probably have extinguished the lien. But the defendant did no such thing. He denied that there was any interest in arrear, and virtually claimed that no occasion had arisen enabling the plaintiff to accelerate the payment of principal at his option; but he at the same time wished to hold the plaintiff to his offer, so far as it embraced the idea that the whole principal was payable, and accordingly tenders the balance, and it being refused, he claims that he is discharged from any obligation to pay anything. This is a very different thing from accepting an offer in the terms or spirit in which it is made.

It is not probable that the plaintiff refused the tender on the ground that he would prefer to keep his money upon interest until the expiration of the original time of credit; no doubt he refused it because he believed the alleged payment was a matter by which he was not bound, and because the whole principal and interest were not tendered. But that is no consequence. It is very plain that the defendant had no right to

tender an amount of principal which had not become payable, and the plaintiff was under no obligation to give any reason for refusing it. It is hard enough for a mortgage creditor to lose his debt because he has been mistaken as to the effect of a payment of a small part of the amount, and has refused a tender of what the debtor claimed, and has been enabled to establish, was the full sum due. The plaintiff is sufficiently punished for his mistake, or the mistake of his legal advisers, when he is turned out of court with costs, for insisting upon a case which he could not sustain. The court had no right to go further and pronounce a forfeiture of the debt confessedly owing, and which would not become payable for nearly a year from the time of the tender. Hence, I am in favor of modifying the judgment appealed from by striking out all that portion thereof which follows the award of costs against the plaintiff, and of inserting in the place thereof, as follows: "But it is further adjudged that the tender, mentioned in the answer and in the proof, did not have the effect to extinguish the lien of the said mortgage as to the refusal of the moneys secured thereby, over and above the sum of $490.03, found by the supreme court to have been paid thereon, and that the said bond and mortgage remain in full force as to the said residue of the said mortgage debt."

If this modification is agreed to by the judges, there ought to be no costs against either party on this appeal.

The following opinion was rendered by T. A. JOHNSON, J.—Upon the facts established by the findings, this appears to be a very plain case. The plaintiff became the owner of the bond and mortgage in question on May 13, 1862, by assignment from the mortgagee. As assignee he took, subject to all equities existing at the time of the assignment, in favor of the debtor against his assignor. Any demand which the debtor might then have applied or set off against the assignor, he may have applied or set off against the assignee. This principle is so well settled that it would be a waste of time and labor to cite authorities in its support. At the date of the assignment, the defendant, Tatham, was, in equity if not in law, in respect to this bond and mortgage, the principal debtor, he having, on

January 26 previous, taken a conveyance of the mortgaged premises, subject to the same mortgage. This conveyance was made to the defendant Tatham, at the instance and for the benefit of Alfred A. Arment, who was the equitable though not the legal owner of the premises, and who had as such become liable to pay said bond and mortgage. The fall previous to this, Arment made an agreement with the plaintiff's assignor to do certain work for the latter in the Beekman Hill Chapel, which was then being built on the grounds of such assignor, and that the amount of such work and labor should be applied in payment upon, and deducted from the amount of, said bond and mortgage. This labor had been performed and the amount and value, four hundred and ninety dollars and three cents, agreed upon between Arment and the assignor, and the account with right of application assigned to the defendant Tatham, before the assignment to the plaintiff of the bond and mortgage. This account Arment had agreed to assign to Tatham at the time the conveyance was made to the latter, and the assignment was actually made on May 3, 1862, ten days before the assignment of the bond and mortgage to the plaintiff. It will be seen, therefore, that before the bond and mortgage had been assigned to the plaintiff, the right of the defendant Tatham to have this amount of four hundred and ninety dollars and three cents applied in payment and satisfaction of the mortgage debt had become fixed and vested. The payment had been made in labor, performed upon an agreement that it should apply in that way, and nothing remained to be done to complete it, except, perhaps, to indorse the amount and receipt it as a payment. As the amount has actually been paid in services rendered, equity will regard it as actually applied according to the agreement. It will hold it to have been a payment *pro tanto* in fulfillment of the agreement and the intention. I am of the opinion, also, that the moment the work was completed under the agreement and the amount ascertained and agreed upon, the law would make the application as a payment and satisfaction *pro tanto*. Davis *v.* Spencer, 24 *N. Y.* 386, 391. This amount of four hundred and ninety dollars and three cents was not a latent equity in the hands of a third per-

son, either at the time of the assignment to the plaintiff, or at any other time, and no such question arises in the case.

In any view of the case it is entirely clear that the plaintiff could only enforce the bond and mortgage for the amount due over and above this four hundred and ninety dollars and three cents as against the defendant, Tatham, who insisted upon its application as a payment. Consequently, it was only necessary for him to tender the balance over and above this sum, with the costs which had then accrued. The plaintiff had elected to consider the whole debt due, as he had the right to do, upon the mere payment of interest for the period specified. The tender, or offer of payment of the whole amount remaining due, and for which the mortgage could be enforced, discharged the lien of the mortgage and operated to defeat the action to foreclose.* Kortright *v.* Cady, 21 *N. Y.* 443.

It is strenuously contended by the appellant's counsel that the defendant, Tatham, is estopped by his deed from insisting upon the application of this amount for the work and labor to the mortgage debt. It is argued that having taken his deed subject to the mortgage he can set up nothing against it, but must pay the full amount for which it was given. But no case has been cited, and I think none can be found making any such application of the principle of estoppel by deed. By taking the conveyance of the premises subject to a mortgage, the grantee is precluded from setting up the defense of usury against the mortagage (Sands *v.* Church, 6 *N. Y.* 347; Shufelt *v.* Shufelt, 9 *Paige*, 137); and such a grantee would, I suppose, be estopped from denying the fact of the existence of such a mortgage as against the grantor and his assignees and representatives. Torrey *v.* Bank of Orleans, 9 *Paige*, 649; Denn *v.* Cornell, 3 *Johns. Cas.* 174. But no such question arises here. The existence of the mortgage is conceded, and its validity, to the extent of the amount justly due upon it. And there is nothing, either in the terms of the grant or in the principles of equity, to estop the grantee from showing what amount has been paid and what amount still remains due.

* On this point the court did not agree with the learned judge. See opinion of DENIO, Ch. J.

Certainly he was not estopped as against Dunscomb, and should not be as against his assignee, whose duty it was to ascertain, before taking the mortgage, what claims there were existing against it. He was bound to inquire, and the law will hold him to the knowledge he should have acquired.

The judgment is right, and should be affirmed.

A majority of the judges concurred in the opinion of DENIO, Ch. J., in which T. A. JOHNSON, J., was also understood to concur.

Judgment affirmed as modified in the opinion of DENIO, Ch. J., without costs to either party.

HASBROUCK *v.* THE KINGSTON BOARD OF EDUCATION.

September, 1867.

A refusal to grant a temporary injunction against the collection of a tax, where but a small portion of the amount involved in the controversy can be affected at the time by such temporary injunction, is not an order which in effect determines the action, and prevents a judgment from which an appeal might be taken; and therefore an appeal does not lie from it to the court of appeals.

If a motion for a temporary injunction is denied, not on the ground that the plaintiffs could ultimately have no relief, but because a temporary interference was not deemed advisable by the court to which the application was made, the court of appeals will not review the discretion of that court upon the question.

In order to sustain such an appeal, the papers should show that the motion was denied upon the ground that the plaintiffs could ultimately have no relief.

Abraham B. Hasbrouck and four others, suing on behalf of themselves and other taxable inhabitants, brought an action in the supreme court, against the Kingston Board of Education, Elijah Ellsworth, the collector, and Cornelius Burhans, the treasurer of the Kingston school district, to enjoin the collection of a tax which had been assessed. The question presented was, whether, under the local statutes applicable to this district, the annual tax was not limited to five thousand dollars, or less.

The tax objected to was for twenty-two thousand dollars, and nearly fourteen thousand dollars was collected before this action was brought. A statement of the details is not necessary here, as this court did not pass on the merits.

The plaintiffs moved for an injunction pending the suit.

The supreme court, at special term, denied the motion, on the grounds, 1, that the tax was regular and authorized by the act, and, 2, that the remedy by injunction was inappropriate under the modern adjudications. This decision was affirmed, on appeal, by the court at general term.

An action was then brought by the attorney-general, in the name of the people, against the same defendants, for substantially the same relief. The application for an injunction in this suit was likewise denied, and the decision affirmed.

Appeals were taken by the plaintiffs in both suits from the orders of the court at general term to this court.

M. Schoonmaker, for defendants;—Moved that the appeals be dismissed; citing Vandewater *v.* Kelsey, 1 *N. Y.* (1 *Comst.*) 533; Selden *v.* Vermilyea, *Id.* 534; and also insisted that the orders were right on the merits.

E. Cooke, for the plaintiffs, appellants.

By the Court.—Hunt, J.—The objection is made, that the orders in question are not appealable to this court. I think the objection is well taken.

It is claimed that the appeal is sustainable under subdivision 2 of section 11 of the Code, which gives such appeal from "an order affecting a substantial right . . . when such an order in effect determines the action, and prevents a judgment from which an appeal might be taken," or discontinues the action, or grants or refuses a new trial. The order in question does not determine the action or prevent a judgment from which an appeal might be taken. It may possibly prejudice the plaintiffs to the extent of that portion of the tax of 1866 yet uncollected; but the action remains, with the question to be decided by it, for future years, and with the power of appeal from the

judgment to be rendered. If it shall be held, ultimately, that the plaintiffs are right, then the defendants, in their levies, will be restricted to five thousand dollars a year, or be limited to the specific items admitted by the plaintiffs to be properly within their jurisdiction.

If the defendants' view is sustained by the courts, they will be at liberty the next year, and so long hereafter as the law shall remain unrepealed, to levy such sums as they may determine to be necessary and proper for the purposes specified in the act. There is evidently much the most important duty of the action yet to be performed.

The amount of the present tax, yet uncollected, is trifling compared with the amount which will be determined by the judgment yet to be rendered. The orders in question do not, in effect, determine the action, or prevent a judgment from which an appeal can be taken, and are therefore not appealable to this court.

Again. The papers do not show whether the motion was denied upon the ground that the plaintiffs could ultimately have no relief, or because a temporary interference was not advisable. In the latter case, the motion below was addressed to the discretion of the court; and the general term having acted, we cannot review their determination. People *v.* New York Central R. R. Co., 29 *N. Y.* 418; Clark *v.* City of Rochester, 34 *Id.* 355. Whether the interests of the individuals who had not yet paid their tax should command the interposition of that tribunal, or whether the interests of education were the more important in the particular case, were matters for the discretion and judgment of the court below. In such cases we require them to act, but we do not assume to determine what their action shall be. See cases above cited.

I am of the opinion, also, that an injunction cannot legally issue to restrain the collection of a tax, although illegally imposed. Heywood *v.* City of Buffalo, 14 *N. Y.* 534, 537; Mutual Benefit Life Ins. Co. *v.* Supervisors of N. Y., *Dec.*, 1866.

The party must take his remedy by action for the damages he has sustained. *Id.*

[The remainder of the opinion related to the merits of the case, but upon these the court did not pass.]

A majority of the judges concurred in dismissing the appeals, on the ground that the orders were not appealable.

Appeals dismissed, with costs.

HATCH *v.* PRYOR.

September, 1867.

It seems, that one to whom a promise is made for the benefit of a third person, cannot by releasing the promissor, defeat the right of action of such third person.

If such promise was embodied in a written agreement, parol evidence of it is not admissible, without accounting for the absence of the writing.

Willard Hatch sued Dan Pryor in the supreme court, on his promise to pay a note made by a third person and held by plaintiff. The note was made by Clark Reason, in favor of one Arnold, and was transferred to plaintiff before its maturity. After the making of the note, Pryor, the defendant, for a valuable consideration moving to him from Reason, agreed with Reason, that he, Pryor, would pay the note. In pursuance of this arrangement, and before the note fell due, Pryor informed plaintiff, who then held the note, that he had made such an arrangement, and offered to pay it then, if plaintiff would accept certain property. This offer plaintiff did not accept. After the note fell due he brought this action, relying on the doctrine of Lawrence *v.* Fox, 20 *N. Y.* 268, to hold Pryor liable directly to himself, on the agreement thus made, for his benefit, with Reason.

The main question raised by the defense was whether a release which Reason had given to Pryor from that agreement was effectual to defeat the action. The note was payable one year from its date; and after it had been transferred to plaintiff, and about five weeks before it fell due, Reason, for a valuable consideration, gave Pryor a release from all liability in respect to the note. No notice of this release was given to Hatch.

Upon the trial before a referee, it appeared that the agreement between Pryor and Reason on which the action was

founded was a written agreement; and the writing not being produced, defendant moved that all the parol evidence respecting it be struck out. This the referee refused, and plaintiff excepted.

The referee found the facts above stated.

The supreme court affirmed the judgment entered on his report finding that the release was no defense; and defendant appealed to this court.

J. M. Humphrey, for defendant, appellant; Cited Lawrence *v.* Fox, 20 *N. Y.* 268, 274.

Galusha Parsons for plaintiff, respondent;—Cited Lawrence *v.* Fox, 20 *N. Y.* 268; Hartley *v* Harrison, 24 *Id.* 170.

PORTER, J.—Upon the facts found by the referee, the release executed by Reason would be ineffectual to impair the rights of the plaintiff, but the finding is unavailing to the respondent, as it is based on evidence which should have been excluded. He gave parol proof, on the hearing, of the agreement between the defendant and Reason, on which he relied to establish his right of action. It afterward appeared that the contract was reduced to writing; and the respondent neither produced it nor accounted for its non-production. The referee erred in denying the defendant's motion to strike out the parol proof thus received, and in giving effect to secondary evidence of a promise, embodied in a written contract, the terms of which were unascertained. Dunn *v.* Hewitt, 2 *Denio*, 637; Rogers *v.* Van Hoesen, 12 *Johns.* 221; Jenner *v.* Joliffe, 6 *Id.* 9.

The judgment should be reversed and a new trial ordered, with costs to abide the event of the action.

A majority of the judges concurred.

Judgment reversed and a new trial ordered, with costs to abide the event.

HAUGHWOUT *v.* MAYOR, &c. OF NEW YORK.

June, 1866.

The provision in the charter of New York city (1 *L.* 1857, p. 886, ch. 446, § 38), which allows, by a vote of three-fourths of the members elected

to each board of the common council, work to be done for the city without a contract,—only extends to work necessary to be done to complete or perfect a particular job, and not to work of a general character nor to a whole job or an original undertaking.

Even if that provision could apply to a whole job and an original undertaking, still, the vote of the common council must precede, and not follow the performance of the work; and a subsequent vote of the common council cannot cure the want of a precedent contract, nor give the party performing the work a claim to compensation.

Eder V. Haughwout and Charles L. Tiffany sued the Mayor, &c. of New York, in the New York common pleas.

Plaintiffs were the president and treasurer of the Broadway Association, an association composed of the merchants doing business on Broadway, in New York, who had voluntarily cleaned that street four nights in the week for two years. They had paid the contractor who performed the labor, eleven thousand dollars, leaving a balance due to him of seven thousand seven hundred and twenty dollars, and this deficiency they petitioned the common council to pay. The common council, by a three-fourths vote in each body, adopted a resolution, providing that the comptroller be directed to draw his warrant for that sum in favor of the plaintiffs, to pay for cleaning Broadway, and charge the same to its appropriate account. The comptroller declined to do as required, and this suit was brought.

Plaintiffs had judgment, which was affirmed by the court at general term, and defendants appealed to this court.

By the Court.—Peckham, J.—It is not pretended that the defendants ever employed the plaintiffs, directly or indirectly, to do this work. It was never done on the credit of the defendants. It was done upon the express arrangement that the association of which the plaintiffs were the officers should raise the money by subscription and pay it. Failing to raise the money as anticipated, they then petitioned the defendants to pay it, and they adopted a resolution to that effect. The question is, is that resolution obligatory, and sufficient to sustain this action?

The defendants' counsel introduced in evidence on the trial

certain ordinances of the city of New York, whereby it was provided that "all work to be done for the corporation shall be performed by contract;" that all such contracts must be authorized by the common council, and then shall be made by the department under whose direction the work is to be performed; that "no contract shall be made, signed, or executed, until proposals therefor have been advertised, and estimates received and decided upon, as provided by this ordinance, except where otherwise provided by law; nor shall contracts be made, begun, or executed for a sum exceeding $250, until all the proposals, estimates, contracts and papers relating thereto shall have been laid before the common council and confirmed by them, and an appropriation made therefor." This is the substance of all these provisions, so far as applicable.

It is, perhaps, questionable whether they apply to this case at all. There was no work done or to be done "for the corporation."

This association, composed of merchants, owners and occupants, did this work for themselves, voluntarily, and upon their own responsibility, and in no sense "for the corporation," though the public participated in its benefits.

If the visitors at the Central Park, to gratify their taste, had placed statuary or any other ornament there, as a present to the city, and the city had accepted the gift, they might call that furnishing supplies to the city and ask for payment, as well as the plaintiffs can call this work done for the defendants.

It is not free from difficulty to make this "work done for the corporation," so as to form any consideration for this promise or resolution.

But, assume it to be otherwise obligatory, was this work done in direct violation to the law in reference thereto?

It is insisted that this resolution, having been adopted by "a vote of three-fourths of the members elected to each board," which, by the statute, might dispense with a contract as to "work necessary to be done to complete or perfect a particular job," was equivalent to a similar vote before the work was done; that such a vote dispensed with the necessity of a contract; that a subsequent ratification is equal to a prior legal employment.

I think that that provision applies only to "work necessary to complete or perfect a particular job," not to work of a general character, not to a whole job, not to a new, original undertaking, but only to a job partly finished, and where something is necessary to its completion. This is not that case.

The statute is express that "all contracts to be made or let by authority of the common council for work to be done," &c., shall be made by the appropriate heads of departments, under such regulations as shall be established by ordinances of the common council. Then follows the provision before referred to. The statute then proceeds to make general provision for all cases with the exception and qualification before mentioned, and says: "And all contracts shall be entered into by the appropriate heads of departments, and shall be founded on sealed bids or proposals made in compliance with public notice advertised in such of the newspapers of the city as may be employed by the corporation for the purpose." *Laws of* 1857, p. 886, § 38.

Again, if the qualification of the statute "unless by a vote of three-fourths of the members elected to each board it shall be ordered otherwise," could be made to apply to a job like this, it seems to me the policy of the law, as well as the language of the act, required that vote to precede the doing of the work. The act is express, even according to the plaintiffs' interpretation, that no work shall be done for the corporation except by contract, unless that contract shall be waived by a three-fourths vote. It was not waived here. It was neither by contract, nor under any waiver of a contract. Then it was clearly done in violation of the law.

It rests with the plaintiffs to establish that a vote, after the work was done, might waive the illegality and make that lawful by relation which was before illegal and in direct violation of the statute. The policy of the statute is in a contrary direction. It intended to insist upon a contract in all cases, unless in one special case the councils should order it to be done otherwise. The necessity for its being so done should be first passed upon by the councils.

The pressure for such a resolution would be far stronger after than before the work, and much more difficult to resist. Hence,

contracts for work under such a rule would soon be the exception, not the rule of practice.

Under the statute before cited, I am quite clear that the duty of making this contract in the manner specified in the statute was committed to the street inspector. The work was done without any such contract, and in direct violation of the statute regulating the doing of such work. In such case no subsequent ratification of the common council can give the party any claim to compensation.

We are referred to Peterson *v.* Mayor, &c. of N. Y., 17 *N. Y.* 449, as sustaining the position of the plaintiffs. The court there held that the work done in that case was not within the aim of the statute; that the services might have been lawfully rendered at the expense of the city by a person directly employed by resolution of the common council, or by any express or implied authority; but held that where the charter or a statute binding upon the corporation has committed a class of acts to particular officers or agents, other than the general governing body, or where it has prescribed certain formalities or conditions to the performance of any description of corporate business, the proper functionaries must act and the designated terms must be observed, and generally no act of recognition can supply a defect in these respects. *Ib.*; 17 *N. Y.* 454, per DENIO, J. People *ex rel.* Smith *v.* Flagg, *Id.* 584, holds no different doctrine.

The same doctrine is held in Donovan *v.* Mayor, &c. of N. Y., 33 *N. Y.* 291, where Mr. Justice PORTER remarks that the city has no power to act except through its municipal officers, and where they assume as its agents, to exercise authority in disregard of prohibitions applying alike to them and their principal, their action is wholly ineffectual unless it be to subject them to personal liability for assuming powers with which the law has not clothed them.

In Harlem Gas Co. *v.* Mayor, &c. of N. Y., 33 *N. Y.* 309, this court held that the supply of gas was not within the purview of the statute requiring advertisements and bids. I am unable to find any principle that will sustain this judgment.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

All the judges concurred.

Judgment reversed, and new trial ordered, costs to abide the event.

HAYWARD *v.* THE LIVERPOOL AND LONDON LIFE AND FIRE INSURANCE COMPANY.

September, 1867.

Affirming 7 *Bosw.* 385.

A provision in a policy of fire insurance, exonerating the company from loss by fire which should happen by explosion, must be taken to include an explosion of a steam engine insured by the policy, as well as any external explosion.*

The exception of fire caused by explosion, is not inconsistent with the fact that the engine itself was insured against fire.

The rule that, in case of repugnancy between the written and the printed parts of the policy, the written shall prevail over the printed part, is not applicable in such a case. In such cases the inquiry always is, is there any repugnancy between the exception and the scope of the undertaking in the policy? If not, effect is to be given to both the written and printed parts, according to the ordinary rules of construction.

Nathaniel Hayward sued the Liverpool & London Fire and Life Insurance Company, in the New York superior court, on a policy of insurance of an India rubber factory against fire. Among the articles specified in the written part of the policy as insured were "machinery, tools, steam engine and shafting contained in building No. 1."

In the body of the *printed* part of the policy was the following proviso or condition:

"Provided always, and it is hereby declared and agreed that this company shall not be liable to make good *any loss or damage by fire, which shall happen or arise* from any foreign invasion, insurrection, riot, or civil commotion, or any military or usurped power, *or by any explosion*, earthquake, or hurricane,

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* This case may be regarded as overruling the case of the same plaintiff against the Northwestern Insurance Company, decided in the supreme court in 1864, and reported in 19 *Abb. Pr.* 116. Compare Evans *v.* Columbian Ins. Co., 44 *N. Y.* 146.

and the policy shall remain suspended and of no effect in respect to any loss or damage which shall happen or arise during the period of any of these contingencies."

One condition printed upon and referred to in the policy, was: "Neither will this company be answerable for loss or damage to stock or goods while undergoing any process in which the application of fire heat is necessary, *nor for loss or damage by explosion of any kind.*"

The superior court held that the exception exonerated the company, and gave judgment for the defendants. Reported in 7 *Bosw.* 385. Plaintiff appealed.

Luther R. Marsh and *O. W. Sturtevant*, for plaintiff, appellant;—Cited Harper *v.* Albany Mut. Ins. Co., 17 *N. Y.* 194; Bryant *v.* Poughkeepsie Mut. Ins. Co., *Id.* 200; St. John *v.* Am. Mut. Ins. Co., 11 *Id.* (1 *Kern.*) 516; Harper *v.* City Ins. Co., 1 *Bosw.* 520;* Hayward *v.* N. W. Ins. Co., 19 *Abb. Pr.* 116; Harper *v.* N. Y. City Ins. Co., 22 *N. Y.* 441, 443; Citizens' Ins. Co. *v.* McLaughlin, 6 *Am. Law Reg. N. S.* 374.

Alex. Hamilton, Jr., for defendants, respondents;—Cited Harper *v.* Albany Ins. Co., 17 *N. Y.* 194; St. John *v.* Am. Mut Ins. Co., 11 *Id.* (1 *Kern.*) 516.

J. M. PARKER, J.—The provision in a policy that a company will not be liable to make good any loss or damage by fire which shall happen or arise by any explosion, repeated in the conditions appended, and referred to in the policy, must, I think, be taken to include an explosion of the steam engine insured, as well as any external explosion.

There is no inconsistency in such construction with the fact that the engine itself was insured against fire. The company might well say: We will insure your factory, engine included, against fire produced from every cause, except an explosion of the engine. So far from there being any inconsistency in this, it is impossible to say that it was not a wise and reasonable provision, intended to induce carefulness in the management of the engine, and to refuse the risk of carelessness in its use. It

* Affirmed in 22 *N. Y.* 441.

is said the defendant had been paid an extra price for the risk caused by the engine. Still the exception in the risk of its explosion is not inconsistent with that fact. Undoubtedly the use of a steam engine, and without respect to its liability to explode, increases the hazard of loss by fire to a building in various ways, which sufficiently accounts for the extra charge for insurance, where one is used. In the case of Harper *v.* Albany Mutual Ins. Co., 17 *N. Y.* 194, relied upon by the defendant, the doctrine affirmed was, that in construing a policy of insurance, the intent of the parties is to be gathered from both the written and printed portions, and effect given to both, so far as can be; but in case of repugnancy between them, the written part shall prevail over the printed part; and the principle was illustrated by the learned judge who gave the opinion of the court, in the following manner: "When the insurance is directly upon the stock in trade, as, for example, in the business of manufacturing and sale of camphene, to hold that a general printed prohibition (contained in every policy of insurance) against keeping or using it, unless permission be specially given and indorsed upon the policy, would have the effect to nullify its direct and positive stipulations, would be proposterous."

The case at bar is very different from that of Harper *v.* Albany Mutual Insurance Co.; and as we have seen that there is no repugnancy between the insurance of the engine against loss by fire and the exception of loss and damage by fire, occasioned by the explosion of the engine, it is not within the principle of that case.

The inquiry always is, is there between the exception and the scope of the undertaking in the policy any repugnancy? If not, in construing the policy the intent of the parties is to be gathered from both the written and printed portions, and effect given to both, according to the ordinary rules of construing written contents.

I am of the opinion that the judgment of the superior court is right, and should be affirmed.

PORTER, J. The insurance of property, in contemplation of its use for a known and specified purpose, imports, *ex vi termini*, a license to keep the articles and employ the agencies in-

cidental and essential to beneficial enjoyment for the use proposed. Against a license of this nature, implied from the language used in the written portion of the policy, a printed prohibition in some other portion of the instrument will not be allowed to prevail. This was the principle settled in the cases on which the appellant mainly relies. Harper *v.* Albany Mut. Ins. Co., 17 *N. Y.* 194; Bryant *v*, Poughkeepsie Mut. Ins. Co., *Id.* 200.

We see no reason, however, for extending it to a case like this, where there is no inconsistency between the written and the printed clauses, and where full effect can be given to all parts of the instrument, in harmony with the manifest intent of the parties.

The company does not claim a forfeiture by the plaintiff of his rights through the use of the boiler in question, but appeals to a mutual stipulation in the contract that the insurer should should not be held liable for injuries resulting from a particular cause. The use of a steam engine, generating a high degree of heat, would necessarily expose the property to more than ordinary danger, and an extra premium was accordingly charged for the risk. There was one hazard, however, connected with its use, which the company refused to assume, and for which it received no compensation. The language of the stipulation is plain, and its purpose entirely obvious. The plaintiff was at liberty to keep and use shafting, engines, boilers, and whatever else was customary and needful in conducting the business of his factory. The insurer was to make good any injury to the property by fire; provided always that such fire should not be caused "by any explosion;" and in that case, it was mutually agreed that the defendant should not be liable to make good the loss. The injury resulted from such an explosion; and there is no principle on which the company can be chargedt wih a liability from which it was absolved by the plaintiff, in the very contract on which he sues. St. John *v.* American Mut. Fire and Marine Ins. Co., 11 *N. Y.* 516; Strong *v.* Sun Mut. Ins. Co., 31 *N. Y.* 103.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

HAZARD *v.* SPEARS.

December, 1868.

After factors had informed their principals of the failure of a contract for the sale of the goods consigned, and of their having recovered possession of them at a distant place, and left them there with other agents of the principals for sale, the principals, for seven weeks after being fully informed of the facts, gave no intimation of objections, and did not communicate their intention to disavow the transaction until about eleven weeks after they were informed. *Held*, that these circumstances were sufficient proof of ratification.

To constitute the conversations and acts of the principals, with knowledge of the facts, a ratification, it is not material whether a ratification was contemplated or not.

George S. Hazard and Frank W. Fiske sued James Spears and James D. and Ezekiel M. McDonald, in the Buffalo superior court, to recover money paid.

The plaintiffs, being factors at Buffalo, and having received from defendants, who were pork packers in Indiana, a consignment of hams to be sold for defendants' account, at a limited price, contracted for the sale of the hams at the price limited, to one Perry. This sale was made through one Howe, Perry's agent. The terms were cash on delivery. After the hams had been put in transit for delivery to Perry at New York, and when plaintiffs had received only a part payment, Perry failed in business. This part payment was in fact made, not on account of the entire contract, but on account of a specified portion of the hams.

Plaintiffs, on learning of Perry's failure, rescinded the sale, and recovered possession of all the hams in the city of New York on their arrival there. After unsuccessful efforts to sell them in New York, they put them in the hands of Purdue & Ward (who were defendants' agents in New York), to be sold for defendants. They fixed no limit as to price. They immediately wrote to defendants stating fully these facts, except that they omitted to state that the part payment was not on account of the entire contract, but on account of a part only of the hams. The hams were sold in the market at a loss. After various

communications between the parties, which are sufficiently stated in the opinion of HUNT, J., the plaintiffs brought this action to recover the balance of certain advances which they had made on the consignment. The defendants relied on their objections that the final sale was not authorized by their instructions; that plaintiffs did not communicate fully the facts in respect to the transaction of the first sale, and had misinformed defendants in respect to it, and that defendants had not ratified the transaction. The plaintiffs relied principally on the fact, that, although defendants were informed personally in the middle of June, of all the circumstances of the transaction, and were within thirty-six hours of plaintiffs by a daily mail, they gave no intimation of dissent until August 8, and did not communicate their intent to disavow the transaction until September 5; and that this long delay was a clear adoption of plaintiff's acts. The plaintiffs had settled with Purdue & Ward on the final sale, and allowed the latter their commissions thereon; and in their account against defendants on which this action was brought they charged their own commission on their advances besides.

On the trial the judge instructed the jury that the letters put in evidence did not show a ratification of the sale; but he left it to the jury to determine whether the conversations in the middle of June were a ratification, and instructed them that if they found that they were, plaintiffs were entitled to receive not only the balance of advances, but their commissions on the sum they had advanced, and that both factors were entitled to a commission.

Plaintiffs had a verdict, judgment on which was affirmed at general term. Defendants appealed.

Benjamin H. Williams, for defendants, appellants;—Insisted there could be no ratification if neither party entertained the idea of ratification at the time of the conversation; and that the evidence showed defendants were ignorant of material facts, and therefore had not ratified the sale. Citing 33 *Penn. St.* 340; Owings *v.* Hull, 9 *Pet.* 607; Seymour *v.* Wyckoff, 10 *N. Y.* (6 *Seld.*) 223; Nixon *v.* Palmer, 8 *N. Y.* (4 *Seld.*) 398; *Dunl. Pal. Ag.* 171, 172; *Story on Ag.* 234–243; Bruce *v.*

Worth, 40 *Barb.* 654; Copeland *v.* Mercantile Ins. Co., 6 *Pick.* 202; Bell *v.* Cunningham, 3 *Pet.* 69; Horsfall *v.* Fauntleroy, 10 *Barn. & C.* 755; Thorndyke *v.* Godfrey, 3 *Green.* 489. Also that it was error to allow commissions of both factors.

John Ganson, for plaintiffs, respondents;—Cited Prince *v.* Clark, 1 *Barn. & Cress.* 186, S. C., 8 *Eng. Com. L.* 80; Cornwall *v.* Wilson, 1 *Ves. Sr.* 509.

HUNT, Ch. J.—The sale of the hams in New York, at a lower price than that fixed by the defendants, and obtained by the plaintiffs in Buffalo, gives rise to the present controversy. The plaintiffs were limited in price by the order of the defendants. They were expressly directed not to sell them for less than seven and three-fourths cents per pound. The sale made in Buffalo was at that price, but the purchaser failed to pay, and the sale was rescinded. The expenses of the property to New York, and the sale there, together with the fall in price, produced the loss for which the amount of the verdict was given.

Immediately upon his return from New York, Mr. Hazard, one of the plaintiffs, wrote to the defendants, giving a full account of the transaction, and informed them that the hams had been left with Purdue & Ward, to dispose of to the best advantage. In the several letters, the defendants acknowledge the receipt of this information, and make no claim that they did not approve of the entire proceeding. The judge, at the trial, decided that these letters did not constitute a ratification of the transaction. The case does not furnish the ground for this decision. I presume it was from the fact, that it is assumed in each of the letters, that the one thousand eight hundred dollars paid was upon the purchase of the entire quantity of hams, and would go to reduce the loss that would arise from the entire sale. In truth, this sum was received in payment of a specific portion of the hams, one car-load, and would mitigate the loss upon that portion only, leaving the entire loss upon the remaining portion unprovided for. This would produce a great difference in the general result, and was an important fact in the case. The defendants' ratification, assumed from their failure to object, being based upon an errroneous understanding

of the facts, could not bind them. I think the ratification that might be supposed to arise from this view of the case must be abandoned.

The question then arises, did the conversation in June, 1861, between the defendant Spears and the plaintiff Hazard, furnish evidence, on which the jury are at liberty to find a ratification? By the letters already referred to, the defendants had been informed of the entire transaction, with the exception of the erroneous understanding on their part as to the one thousand eight hundred dollars already mentioned. They had been distinctly informed that the property was left with Purdue & Ward for sale, and without limit as to price. In the conversation now referred to, all the transaction is again rehearsed to Mr. Spears, the understanding as to the one thousand eight hundred dollars is now corrected, and he is informed that the property is left with the New York house for sale, without limit. As testified by Mr. Hazard, he made no objection to the transaction; imputed no blame to the plaintiffs, and expressed his regret at the probable loss. Mr. Spears, himself, testifies that he did not feel it his duty to be frank with the plaintiff, or to tell him that he would be held liable for the sale of the hams.

Under the circumstances stated, the title to the property thus in the hands of Purdue & Ward, was in the defendants. If a change in the market had occurred, by which the price had advanced, the benefit would have accrued to the defendants, and not to the plaintiffs. The sale to Perry was made by the plaintiffs, as the agents of the defendants, and upon his failure to perform, as such agents, they resumed the possession of the property. They, as such agents, also, left it with Purdue & Ward for sale, without limit as to price. All this was communicated to Spears in person. If he wished to repudiate what had taken place, and to countermand the directions for sale, given in behalf of his firm, and to hold the plaintiffs to the first instructions, it was his duty to have done it promptly. It should have been done on the spot, or certainly within a few days. In fact, there was no renunciation or countermand until September 5, thereafter, although a doubt upon the subject of their liability to bear the loss was intimated in a letter of August 8.

In Prince *v.* Clark, 1 *Barn. & C.* 186; 8 *Eng. C. L.* 80, the plaintiff had shipped by the defendant certain goods to the East Indies for sale, with directions to invest the proceeds in specified articles. The defendant invested the amount in Benares sugar, which was not one of the specified articles, and advised the plaintiff of the purchase by a letter, received by him on May 29. The plaintiff made no objection until August 7, when he notified the defendant's agent that he disowned the purchase. The jury held, that by his delay he had assented to the acts of the agent, and the court of king's bench affirmed their verdict.

BAILEY, J., says: "The principal has no right to pause and wait the fluctuation of the market, in order to ascertain whether the purchase is likely to be beneficial. He is bound, if he dissents, to notify his determination within a reasonable time."

HOLROYD, J., says: "I think the jury might fairly infer from the facts of the case, that the plaintiff did once assent to take the cargo on his own account, or that he meant, at least, to take the chance of the market."

It was objected, in that case, that the defendant had no agent to whom notice could be given, and that he could receive no benefit from the notice. The court held, nevertheless, that an agent might have been found by inquiry, and that the verdict was justified.

The defendants insist that this principle does not affect this case, because, they say, that Howe was liable on the draft given up to Perry; that he was solvent, and that Spears was not advised of this state of things by Hazard in the June conversation. There are two answers to this objection. It does not appear that Howe was personally liable on the drafts drawn on the produce shipped. It appears, very distinctly, that he was acting in the transaction of the purchase, as the agent of Perry, and thus without interest. Whether the drafts drawn by him upon Perry were drawn as agent, or whether he voluntarily made himself liable upon them, is not proved, and, I think, cannot be assumed. Another, and quite a satisfactory answer is this, that no such point was raised on the trial. If the defendant claimed that the conversation and the delay to repudiate, did not furnish evidence of assent, because Spears

was not informed of the fact that Howe was liable on the drafts, and was solvent, he should have called attention, on the trial, to the precise point of which he complained. It was plainly stated that the drafts, whatever they were, were given up to Perry as a means of obtaining the return of the property. This, the defendant Spears certainly knew, and if he had not been informed of the other alleged facts, and had, on the trial, placed himself on that ground, the plaintiffs would then have had the opportunity of showing how the facts were, and what was the statement of them to Spears. To allow it now to be urged, when it was omitted at the proper time, would be quite unjust. The point is of frequent occurrence, and we rule upon it at nearly every term.

In the same manner the defendants object, that Spears was not informed by Hazard that the sale was in fact to Perry and not to Howe. If this fact is of importance, the answer to the objection is the same as that given to the preceding one, that attention was not called to it on the trial.

The defendants also insist that the judge erred in refusing to charge, that if, in the conversation referred to, Hazard did not entertain the idea of procuring a ratification, and Spears did not intend to ratify the plaintiffs' acts, there was no ratification. If Hazard's testimony is to be relied upon,—and it was believed by the jury,—he had acted, as he supposed, faithfully and honestly in the discharge of his duty as the defendants' agent, in making the sale, in recapturing the property, and in directing its resale by Purdue & Ward, at the best price that could be obtained. Upon the first opportunity he communicates all the facts orally to Mr. Spears. The question then is, what is the legal effect of all this, with the answers of Spears in connection? If both Hazard and Spears had certainly thought that the transaction was right in itself and could not be disturbed or repudiated, and that no ratification could improve it, and therefore had no intention on the subject, would that have altered the legal effect of what they said and did? Or if Spears was satisfied that he had an advantage of Hazard, and meant to stand upon his strict rights, and at some convenient time to assert them, and yet, upon a full and frank statement of all the facts, made no visible or audible repudia-

tion of the transaction, would he not have been concluded by his silence? The case of Prince *v.* Clark is clear to the point that he would be. The law passes its judgment upon, and gives legal effect to, what is said and done. Intentions, except as they are manifested by the acts and statements of the parties, are of no avail.

I see no difficulty from the allowance of commissions, nor from the other objections to the rulings on the trial.

Judgment should be affirmed, with costs.

CLERKE, J.—The only question in this case is whether the defendants ratified the sale ordered by the plaintiffs in New York. After the latter ordered the sale, they communicated with the defendants, giving them a complete history of the transaction, their letter being dated May 20, 1861. The defendants wrote an answer, regretting the trouble that the plaintiffs had in respect to the hams, and expressing a hope, that the eighteen hundred dollars which they had received from Howe, would make good all their losses, and that they would be paid for their extra trouble. There was other evidence of acquiescence. All this was properly left to the jury, to determine whether it proved a ratification.

The judgment should be affirmed, with costs.

A majority of the judges concurred in affirming the judgment.

Judgment affirmed, with costs.

HEROY *v.* KERR.

September, 1866.

Affirming 8 *Bosw.* 194; S. C., 21 *How. Pr.* 402.

A *bona fide* purchase for value, from the president of an insolvent corporation, of property which he had purchased from the company for an antecedent debt due such president, is valid against the creditors of the company, although the sale by the company to the president was void as to such creditors.

James H. Heroy and others sued John Kerr, in the New

York superior court, for the conversion of certain glass, which plaintiffs alleged was in their possession at the works of the American Glass Company, but which defendant had caused the sheriff of Brooklyn to take away and sell, and the proceeds of which defendant had received.

Defendant denied ownership in the plaintiffs, and alleged the property to have been owned by the American Plate Glass Company, and justified the seizure and sale by virtue of a judgment in his favor against that company.

On the trial, before a single judge without a jury, it appeared that the American Plate Glass Company was incorporated under the general manufacturing companies act, and was in operation, manufacturing glass, during the years 1856, 1857 and 1858, and that its president had been Lewis A. Sayre. The other facts necessary to an understanding of the case are given in the opinion. Plaintiffs had judgment.

The superior court, at general term, held that the question to Sayre as to the financial condition of the company immediately prior to and at the time of the levy, was improper, since there had been given, at that period of the trial, no evidence of any fraudulent sale of goods. Reported in 8 *Bosw.* 194; S. C., 21 *How. Pr.* 409. Defendant appealed to this court.

Winchester Britton, for defendant, appellant.

W. W. Niles, for plaintiffs, respondents.

JAMES C. SMITH, J.—Upon the facts found by the judge who tried the cause, the conclusion reached by him, that the plaintiffs are entitled to recover, is unquestionably correct. He found, in substance, that the property in dispute was owned by the glass company, originally; that by a sale binding on the company, their title was transferred to the plaintiffs, for a valuable consideration, and that subsequently the defendant bought the property at an execution sale against the company, with notice of the plaintiffs' claim. The judgment, therefore, should not be disturbed, unless some error prejudicial to the defendant was committed in the progress of the trial.

The defendant's counsel insists that the court erred in several particulars, which will now be stated.

First. In sustaining an objection to the question put by the defendant to the witness Sayre, as to what was the financial condition of the glass company immediately prior to, and at the time of the levy.

Secondly. In refusing to hold, as requested by the defendants on the trial, as follows: (1.) That, if any sale of the glass in question was ever made by the company, it was to Sayre, the president of the company, in payment of an antecedent debt owing to him by the company, and that at the time of the sale the company was insolvent, and had refused payment of its notes in specie, or lawful money of the United States, and that said sale was void under and by virtue of part I. c. 18, title 4, sec. 4 of the Revised Statutes. (2.) That, if there was a sale by the company to the plaintiffs, it was equally void under the same section. (3.) That a sale of the property of the company, under the circumstances, for the worthless stock of the company, was a fraud on the defendant, a creditor of the company.

Thirdly. In refusing to pass upon the following questions, which the defendant, by motion, made subsequently to the filing of the decision, requested the court to pass upon, to wit: (1.) Had the company refused to pay any of its notes or other evidences of debt, in specie or lawful money of the United States, prior to the transfer of the property in controversy? (2.) Was the company insolvent at the time of the transfer?

All these positions may be answered in a few words. It is undoubtedly true, as claimed by the defendant, that the sale by the glass company was made to Sayre, the president of the company, and not to the plaintiffs.

The testimony warrants this conclusion, and it is consistent with the findings of the court. But the plaintiffs subsequently bought of Sayre, for a valuable consideration, and there is no evidence that they had notice of any defect in his title. By that purchase they acquired a good title, notwithstanding the title which Sayre obtained from the company might have been impeached by the creditors of the company, while such title remained in his hands. The plaintiffs' title could not be affected by either or all of the circumstances, that the company

was insolvent at and prior to the time of the sale to Sayre; that it had refused payment of its notes; that he was the president of the company, and that the sale to him was in payment of an antecedent debt, or by the existence of any other fact or circumstances which merely rendered the sale to Sayre fraudulent and void, as against the creditors of the company.

The defendant's counsel argues that the sale to Sayre was made without authority, and was, therefore, void, but the court found, as a fact, that the sale was binding on the company, and that finding is conclusive upon the point.

The judgment should be affirmed.

DAVIES, Ch. J., also read an opinion for affirmance.

All the judges concurred.

Judgment affirmed, with costs.

HICKS *v.* BRADNER.

March, 1868.

A wife is not a competent witness in an action brought by her husband against a third person for criminal conversation.*

Russell F. Hicks sued Amariah H. Bradner, in the supreme court, to recover damages for criminal conversation with plaintiff's wife.

On the trial, the defendant called as witness the plaintiff's wife, to disprove the wrongful act complained of, and she was allowed to testify, against plaintiff's objection. The jury found for defendant; and judgment thereon having been reversed by the court at general term, and a new trial ordered, defendant appealed.

——— ———, for defendant, appellant.

Spencer, Thompson & Mills, for plaintiff, respondent.

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* S. P., 2 *L.* 1867, p. 2231, c. 887, § 2.

BY THE COURT.—MILLER, J.—It is evident that the judge erred upon the trial in allowing the wife of the plaintiff to be sworn as a witness and to testify against her husband. At common law, the husband and wife could not be witnesses for or against each other, and this rule of the common law is not changed by the provisions of the Code, which abrogate the disqualification of witnesses by reason of their being parties. These provisions, as they existed when this action was tried, have no application to a case like the one at bar, as has been held in numerous adjudications of the court. Hasbrouck *v.* Vandervoort, 9 *N. Y.* 153; Smith *v.* Smith, 15 *How. Pr.* 165; Marsh *v.* Potter, 30 *Barb.* 506; Macondray *v.* Wardle, 26 *Id.* 612; White *v.* Stafford, 38 *Id.* 419; Carpenter *v.* White, 46 *Id.* 291; Rivenburgh *v.* Rivenburgh, 47 *Id.* 419. As this error of the judge was sufficient to authorize the general term to grant a new trial, it is not necessary to examine the other questions raised, and the judgment of the general term must be affirmed.

A majority of the judges concurred.

Judgment affirmed, with costs.

HOCHRIETER *v.* PEOPLE.

March, 1864.

Where a question put to a witness on the trial is proper in part only, a general objection is not sufficient to make it error to admit it, but the particular ground of objection must be pointed out.

In the absence of any indication to the contrary, a statement made in the presence of the prisoner will be presumed to have been made in his hearing also.*

An act of a third person, done in the presence of the prisoner, is equally admissible, as a declaration made in his presence.

Xavier Hochrieter, the plaintiff in error, was indicted in the New York oyer and terminer, for the killing of one Leonard Gander, and convicted of the crime of murder in the second

* Otherwise where stupor is shown. Lanergan *v.* People, 38 *N. Y.* 20.

degree. Upon the trial, one Senior, a policeman, testified that he arrested the prisoner and his son in the street, and took them to 148 Essex street, in the city of New York, where the deceased then was, but he was too far gone to recognize any one. At that place they met one Egner, who was a witness on the trial. The district-attorney asked Senior: "What did Egner say and do in the presence of the prisoner?" The defense objected, the court overruled the objection, and exception was taken. After the question was answered, the district-attorney asked: "Did Egner make any motion, and if so, what?" The defense objected, the court overruled the objection, and exception was taken. The witness answered that he threw up his hands.

On a writ of error brought on a bill of exceptions, the court, at general term, affirmed the conviction in the court below, upon which this writ of error was brought.

Henry L. Clinton, for plaintiff in error.

Nelson J. Waterbury, for the People.

DAVIES, J. [After stating the facts.]—No ground of objection is stated to either question in the bill of exceptions, and the counsel for the prisoner contended on the argument that he was now at liberty to assume any ground of objection; and he now argues that the first question was objectionable on the ground that it did not limit the inquiry to what was said and done in the hearing of the prisoner.

It is to be observed that the question called for not only what was said in the presence of the prisoner, but what was done in his presence. I do not understand the prisoner's counsel now to argue that it was not legitimate to prove what Egner did in the presence of the prisoner, but he contends that by possibility what was said in his presence might not have been said in his hearing. A portion of the question,—that is, what was *done* in the prisoner's presence,—it is not questioned, was legal and proper, and if the other portion,—what was *said* in the prisoner's presence,—was objectionable on the ground that it was not said in his hearing, that objection should have

been pointed out upon the trial. The exception is to the question, what was *said and done* by Egner in the presence of the prisoner—covering, therefore, both branches of the inquiry. The latter portion is conceded to be legitimate, and the former portion is also conceded to be proper if it had appeared that what was said was said in the hearing of the prisoner. This objection, to have availed the prisoner, should have been specifically pointed out on the trial; and as the exception covers clearly what was a legitimate inquiry, it cannot be questioned.

But it may well be questioned, whether the whole inquiry does not clearly indicate that it pointed to what was said in the hearing of the prisoner. He was then present, and any inference would be, in the absence of any countervailing circumstance, both from the question and the answer, that the conversation inquired about and detailed was in the hearing of the prisoner. In Rex *v.* Bartlett, 7 *Carr. & P.* 832, Greaves, for the prosecution, was proceeding to detail the anticipated proof on the trial, and stated that a portion of such proof would consist of what the wife of the prisoner said in his presence, and the same was objected to, and BOLLAND, Baron, said he had no doubt the evidence was admissible. I have no doubt that it was competent for the district-attorney to show what was said in the presence of the prisoner, and the inference is irrestible, in the absence of any circumstance tending to raise a contrary presumption, that what was said in the prisoner's presence was also said in his hearing. If it was not, it was competent for the prisoner to rebut the legitimate inference that he was so circumstanced that he did not, or could not have heard what was said. The general objection to the question was properly overruled.

The second question was proper enough in itself, for it might have elicited an answer, tending to show the guilt of the prisoner. The answer indicates clearly that it produced no harm to the prisoner, as the act of Egner in throwing up his his hands was entirely immaterial and of no significance whatever. As the objections to these two questions are the only ground relied upon by the counsel for the prisoner, to procure a reversal of the judgment of affirmance of the conviction of the plaintiff in error, and as we have seen that both objections

are untenable, it follows that the judgment of the supreme court must be in all things affirmed.

HOGEBOOM, J. [After stating the facts.]—I think neither of the exceptions is well taken.

It is supposed the first question was inadmissible, because it did not inquire *in terms*, upon the face of the question, as to a declaration made in the *hearing* as well as in the *presence* of the prisoner. The answer is, that if in the presence of the prisoner it is presumed to have been in his hearing also. The former, in absence of evidence to the contrary, implies the latter. If there were any doubt about it on the facts appearing in the case, the counsel for the prisoner should have objected on that ground, or asked the court for permission to make the fact explicit by evidence one way or the other, and the court would unquestionably have allowed such examination, or required the question to cover such ground. But the objection to the question was general, leaving naturally the impression upon the mind of the court that it was the declaration itself, and not the circumstances under which it was made, which constituted the point of the objection.

The case of Ward *v.* People, 3 *Hill*, 395, is not in point to support the validity of this objection. There a question, the competency of which was neither urged nor objected to except on general grounds, was excluded at the trial, and the court of review, sustaining the decision of the court below, said "any objection may be urged to it here that could have been taken on the trial." In other words, a party offering evidence which is excluded must, on appeal, be able to show that there is no just ground for its exclusion. Here the evidence was admitted, and the general objection overruled, and properly; first, because in any aspect of the case the question was admissible, as by necessary implication embracing the fact supposed to be omitted; and, secondly, because if the question were objectionable, it was so only in a partial and circumstantial sense, which the generality of the objection tended to conceal rather than to disclose.

The other exception is equally untenable. I do not know why an *act* of a third person done in the presence of the pris-

oner, is not equally admissible as a *declaration* made in his presence, provided the nature of the act may be supposed likely to have shed some light upon the nature of the offense, or the guilt of the person. To either, or both, the prisoner would have an opportunity to furnish an explanation if he desired. In this case the court was at liberty to presume an objection made before the question was answered, that the answer might furnish pertinent evidence in the case, and although the answer actually given, to wit: that he (the third person) threw up his arms, does not seem to shed much light on the case, it was not subsequently objected to, nor asked to be stricken out, and it could not possibly have operated to the legal prejudice of the prisoner.

All the other judges concurred, except MULLIN, J., who read a dissenting opinion.

Judgment affirmed.

HOLLISTER *v.* THE HOLLISTER BANK.

September, 1865.

In the settlement of the affairs of an insolvent banking association, nothing is to be repaid to stockholders until after payment of all the debts of the bank.

Robert Hollister and William Wilkinson appealed to this court, from an order made by the supreme court, directing the receiver of the Hollister Bank to divide its remaining assets among creditors, excluding the claims of the appellants (who were stockholders and had been assessed, and had contributed to raise the fund), to share in the distribution.

The details are fully stated in the opinion of DAVIES, J.

C. Tucker, for the stockholders, appellants.

Ganson & Smith, for the receiver, respondent.

POTTER, J.—By a stipulation between the parties, the only question to be decided on this appeal is, the right of the appel-

lants to a share in the money in the hands of the receiver. The appellants claim that, having paid the full amount of the judgments against them, they became creditors to the extent of the sums they paid, and are entitled to a return of the amounts they so paid, *pro rata* with other creditors.

The proceeding in question is a special proceeding under the statute, entitled "An act *to enforce the liability of stockholders* in certain banking corporations and associations as prescribed by the constitution, and to provide for the prompt payment of demands against such corporations and associations," passed April 5, 1849. If the object and intent of this statute was to be determined by its title, the leading feature in its character would seem to be clearly to enforce the payment of the debts (of the creditors of the corporation) against its stockholders upon an individual liability, and not to reimburse and indemnify stockholders for any such debts they may have paid for the corporation or association upon such individual liability.

If we look at the provisions of the act itself, we find in the first section that "the stockholders of such corporation or association shall be individually responsible equally and ratably," for the amount of its debts and liabilities, "such responsibility to be enforced as hereinafter provided and in no other manner." It is not denied that the proceeding in question was in form, according to the manner in the same act afterward prescribed and provided. The several sections of the said act, from the fourteenth to the twentieth inclusive, provide as to the manner of making the debts of the insolvent corporations become liabilities against its stockholders in the form of final judgments, and upon which execution or executions may issue. The twenty-first section directs the moneys raised upon such judgments to be immediately distributed and paid over to the creditors of such corporation or association. By the twenty-fourth section of the act, there is a provision that "*if, after* paying the debts and liabilities of such corporation or association as therein provided, and defraying all the expenses of the proceedings, there shall remain or come to the hands of the receiver any *other* assets or effects of such corporation or association, the same shall be converted into cash as therein before

directed, and shall be paid to the stockholders upon whom any such debts or liabilities were apportioned in just and equal proportion to the sums contributed and paid by them." This whole proceeding, it is seen, is based upon the provisions of this particular statute. The liability of the stockholder is created by the same statute, and authorized by the constitution, § 7, art. 8, *Const.* 1846. His rights to relief, and the manner of and the remedy by which that relief is to be obtained, all depend upon the provisions of the same statute. The statute itself provides no other relief to the stockholder for his liability to and payment of the debts of the corporation to creditors than is provided in the twenty-fourth section of that act, to wit, the surplus or effects that may remain or come to the hands of the receiver after discharging the debts and liabilities of the corporation or association.

The claim, therefore, of the appellants, as stockholders only, not being creditors of the corporation or association in any other sense than in the payment of their individual liabilities cannot be predicated upon this statute. The rights and remedies of the *creditors* of this corporation are, by the first section of the said act, expressly limited and confined, to be enforced by the provisions of that act, "*and in no other manner.*" These stockholders, appellants, in order to be entitled to a distribution of these assets, must first become *creditors* of the corporation. The statute does not, in terms, declare them to be such. If they are such constructively, their remedy is provided by the twenty-fourth section of the statute, and they can enforce it "in no other manner." They cannot occupy the anomalous position and stand both as debtors and creditors at the same time. They are, in the first place, expressly made debtors to the creditors of the corporation, and such they must remain until the creditors are paid the amount of the apportionment. After such payment, not before, they are, by the same statute, made creditors of the surplus that may remain, and of that only. This is the only reasonable and fair construction which this statute is susceptible of. This is also in conformity with the universal rule of construing statutes, "that, where a statute confers a right, and also, in the same statute, prescribes an adequate means of protecting or enforcing it, the

right is confined to the statutory remedy. Dudley *v.* Mahew, 3 *N. Y.* (3 *Comst.*) 9. This statute gave these stockholders, whom it made thus liable to pay the debts of the corporation, a right to the surplus assets and effects, and provided a remedy by which to obtain it. They became stockholders, knowing of their liabilities, rights, and remedies, With these they must be content. They can bring no equities or common law principles to their relief. There is nothing in the first section of this act in the language, "the stockholders of such corporation shall be individually responsible equally and ratably," that interferes or comes in conflict with the construction we have given to its whole language. Were they not confined to the statute in question for their remedies, it would seem to be a mockery of all rules of equity to claim for them an equality or preference in the distribution of assets over the creditors of themselves, or over a corporation put or retained in existence by themselves, and clothed, by their acts and instigation, with a character of apparent credit and responsibility which has invited the confidence of others. The words last above cited from the act are satisfied, by their use in securing to the stockholders, as between themselves, an equal and ratable proportion or apportionment and liability to debts and a ratable and equal division of the surplus assets after the payment of the debts of the association.

I think, therefore, that the order appealed from was right and should be affirmed.

DAVIES, J.—The Hollister Bank, of Buffalo, was an association organized under the general banking law of this State, and doing business as such at the time of its failure, in 1857. Upon such failure, one Alanson Robinson was duly appointed receiver, under the act of 1849, and such proceedings were had, in conformity with the provisions of that act, that it was ascertained and determined that the debts and liabilities of the said bank contracted after January 1, 1850, and remaining unsatisfied, with interest, at the date of the said ascertainment and apportionment, to wit, February 13, 1860, after deducting the moneys in the hands of said receiver, applicable to the payment thereof, was one hundred and sixty thousand nine hundred dol-

lars. The capital stock of said bank was two hundred thousand dollars, and the said sum of one hundred and sixty thousand nine hundred dollars was, on February 13, 1860, apportioned among the stockholders of said bank equitably and ratably, in proportion to the amount of stock respectively held and owned by them, and said apportionment was confirmed by order of the supreme court.

Such apportionment was only to the extent of eighty and forty-five hundredths per centum on the shares of stock held by each stockholder. On an application made to the supreme court by said receiver, on September 8, 1862, he represented that, by reason of his inability to collect and realize the apportionment so made as aforesaid, from a large number of said stockholders, by reason of their insolvency and other causes, and by reason of a debt of six thousand and six dollars and five cents having been established against said bank since February 13, 1860, and which was not included in the debts and liabilities of said bank, as ascertained on that day, the total amount of the debts and liabilities of said bank, contracted after January 1, 1850, remaining unpaid and unsatisfied, including interest to the said September 8, 1862, was ninety-three thousand one hundred and forty-one dollars and eighty-nine cents. The application or petition of said receiver was referred to a referee, to make an apportionment of such remaining debt among the stockholders, who ascertained and determined that the amount of debts and liabilities of said bank remaining unpaid on the day of said apportionment, to wit, October 23, 1862, was ninety-three thousand nine hundred and thirty-two dollars and seventy-five cents, and the same was ratably and equitably apportioned among all of said stockholders, to an amount which, with the former apportionment, equaled the amount of stock held by each person or stockholder in said bank. The amount so apportioned was thirty-nine thousand one hundred dollars. This apportionment was confirmed by the supreme court at special term, and, on appeal, the same was affirmed at general term, and the stockholders, thus again assessed, appealed to this court. The single question presented on that appeal was, whether the first apportionment exhausted the power of the court, under the constitution and the statute, so that a further

appportionment or call could not be made upon the stockholders to the full amount of stock held by them respectively.

Taking into view the provisions of the constitution, and of the act of 1849, it is manifest that it was the intention of both the framers of the constitution, and of the legislature, to make each stockholder liable to contribute to the full amount of his stock, if necessary, to pay off and discharge the liabilities and debts of the bank contracted after January 1, 1850.

The seventh section of article eight, of the constitution, fixes the extent of the liability of the stockholder. It declares that the stockholders in every corporation and joint stock association for banking purposes, shall be individually responsible, to the amount of their respective shares of stock in any such association, for all the debts and liabilities of any kind contracted after January 1, 1850.

The constitution thereupon fixes the extent of the liability of each stockholder, to the full amount of his stock, provided such full amount is necessary to pay off and liquidate the debts and liabilities of the bank.

This court held, that the power of the court under the act of 1849 was exhausted, and that, where one assessment had been made upon the stockholders for their respective shares of the liabilities of the bank, and had been confirmed, and it remained in force, no second assessment could be made to supply a deficiency resulting from the inability to collect the sums assessed on insolvent stockholders, or to raise funds to provide for the payment of debts of the bank not known or anticipated at the time of making the first assessment. In Hollister Bank, Matter of, 27 *N. Y.* 393, it was said, in the opinion, "that the act contains a complete and well digested system for one assessment, without any provision for a second. The contingency of the failure or inability of a portion of the stockholders to respond to the assessment, although it could hardly have escaped the consideration of the legislature, is not provided for in any way. The apportionment of the debts among the stockholders is directed to be made ratably in proportion to their stock, and a new apportionment or assessment, if made under the direction of the statute, is to correct errors in the first, and not to supply a deficiency in its results." . . . . . "And that

the statute gives no authority or jurisdiction to make more than one judgment, the first apportionment and judgment remaining unreversed."

It followed that, although there were debts and liabilities of the bank unpaid, to the amount of near one hundred thousand dollars, and a liability of the stockholders, as fixed by the constitution and act of 1849, to the amount of near forty thousand dollars, remaining uncollected and unrealized, and pledged for the payment of those debts, yet, owing to the defect in the act of 1849, the courts had no power to enforce payment of the amounts still due and unpaid, by the respective stockholders of the bank. In June, 1864, the receiver appointed in this matter, presented his petition to the supreme court at special term, setting forth the proceedings therein, and that, of the aforesaid debts and liabilities of the bank, there yet remained unpaid and due the principal sum of fifty-two thousand seven hundred and twenty-four dollars and three cents, exclusive of interest, and that there were no assets, money or property in the hands of the said receiver or under his control, applicable to the payment of said debts and liabilities, except the sum of twelve thousand six hundred and ten dollars and fifteen cents, which he had realized from the assets of said bank. He thereupon prayed the order of the court directing him to make a dividend of said sum among the creditors of said bank, in proportion to their respective demands, or for such other order as the court might deem just and right.

The court thereupon made an order directing said receiver to divide to and among the creditors of said bank, to whom the debts and liabilities thereof were owing, in proportion to their respective demands, the sum of twelve thousand one hundred and twenty-six dollars and fifty-two cents, and that the residue of said moneys, being the sum of four hundred and eighty-three dollars and sixty-three cents, be retained by said receiver, subject to the further order of the court.

Upon this hearing, the appellants herein, certain stockholders of said bank, who had been assessed their ratable proportion of the debts and liabilities of said bank, and who had paid to said receiver the amount of their respective assessments, appeared and claimed the right to participate in said dividend

to the amount of such payments respectively made by them—in other words, that, by the payment of such apportionment and assessment, they respectively became creditors of the bank to the amount of such payments, and were entitled to share equally and ratably with the other creditors of the bank in the dividend about to be made of the moneys in the hands of the receiver. Such claim was disallowed by the special term, and, on appeal to the general term, the order was affirmed.

From that order these stockholders now appeal to this court.

The constitution, and the statute passed to effectuate its mandate, make every stockholder of this bank liable to the creditors thereof to an amount equal to his stock, or to his just proportion of that amount, if the whole is not required. Empire City Bank, Matter of, 18 *N. Y.* 199; Reciprocity Bank, Matter of, 22 *N. Y.* 9; Hollister Bank, Matter of, 23 *N. Y.* 508. In the latter case we said: "The assets of the bank are deemed the primary fund for the payment of its debts. The creditors, however, are not to be delayed beyond the period of six months for the purpose of converting those assets before proceeding against the stockholders. All that can be realized in that time by collections, or by a sale, to which no reasonable objection exists, is first to be applied. If, however, there is sufficient reason for postponing a sale of any portion of the demands due to the bank beyond the one hundred and eighty days, the creditors are not bound to wait for a further sale, but a dividend must be made, and the stockholders must pay the deficiency and receive the avails of the remaining assets."

The policy of the statutory provisions would seem, therefore, to be obvious. In the first place, it is made the duty of the receiver to convert into money, with the least possible delay, the assets of the bank, and, within the time prescribed by the statute, to divide the proceeds among the creditors of the bank. In case of a deficiency of means to pay all the debts, the same are to be divided *pro rata*. And the stockholders must pay such deficiency. That is the law as enunciated by this court in the cases above cited. The stockholders are not to receive or have divided among themselves any of the assets of the bank until its debts and liabilities are fully paid and discharged.

It would be an anomalous state of things, if the debtor is to be paid the assets and money which the constitution of the State, the statute law, and the decisions of the courts, all declare belong to the creditor, leaving his debts unpaid. It is impossible that the legislature ever contemplated such an absurdity, or that the act of the legislature of 1849, or the decisions of this court, can be perverted to work such a result. Such a position is in direct conflict with the provisions of section 24 of the act of 1849. *Laws of* 1849, c. 226. It declares, "if after paying and discharging the debts and liabilities of such corporation or association, as herein provided, and defraying all the expenses of the proceedings, there shall remain, or come to the hands of the receiver, any other assets or effects of such corporation or association, the same shall be converted into cash, as herein before directed, and shall be paid to the stockholders, upon whom any such debts or liabilities were apportioned, in just and equal proportion to the sums contributed and paid by them."

This is an emphatic declaration by the legislature that nothing is to be paid to the contributing stockholders, until after the payment and discharge of all the debts and liabilities of the bank. In the present case, the assets of the bank, in addition to the contributions made by the stockholders, are inadequate to discharge those debts and liabilities and a large deficiency still remains. For these unpaid debts and liabilities the stockholders are severally liable, to the extent of their capital stock, and even if they contributed the whole amount of such capital stock, there would still be a deficiency. But as we have seen, such additional contribution cannot be enforced, owing to the defects in the act of 1849, and it is therefore contended that such contributing stockholders have had thereby their relations to the bank entirely changed; that instead of being debtors for the amount yet uncontributed of their capaital stock, they have became creditors in the amount already paid and contributed by them under the act, and as such are entitled to participate, with the other creditors of the bank, in the contemplated dividend of the remaining assets. This position is wholly untenable, and the orders of the special and general term exclud-

ing them from such participation were clearly correct, and should be affirmed, with costs.

All the judges concurred, except BROWN, J., who was absent.

Order affirmed, with costs.

HOLLYWOOD *v.* PEOPLE.

September, 1863.

Under an indictment framed under 2 *R. S.* 665, for shooting at A. with intent to kill her, and proof of shooting at B. with intent to kill him, and actually killing A., a request on the part of the prisoner to charge that he could not be convicted of shooting A., is too broad, and it is not error to refuse to charge accordingly.

Eugene Hollywood having been convicted in the New York general sessions, in September, 1865, of assaulting one Eliza, wife of Thomas J. Bayley, with intent to kill her, and the conviction having been affirmed by the supreme court, brought error to this court.

The evidence at the trial showed that the prisoner shot at the husband intending to kill him only; and that the wife being beyond him was hit.

The judge charged that if the jury were satisfied that if Mr. Bayley had been hit, and had been killed, the crime would have been murder, then they might convict of an assault and battery with intent to kill.

The request, on behalf of the prisoner, to the refusal of which exception was taken, was as follows: "I ask your honor to charge, that in this case, if the prisoner pointed and fired at Mr. Bayley *alone*, with intent to kill him or do him bodily harm, the prisoner cannot be convicted of shooting Mrs. Bayley."

THE COURT.—"I shall charge directly the reverse."

The supreme court, at general term, affirmed the conviction; and plaintiff brought error to this court.

S. H. Stuart, for plaintiff in error.—The offense proved

was, both in fact and under the statute, committed against the person of Bayley, the husband. The crime, under the statute, consists of shooting at a person with intent to kill such person. The prisoner may be convicted under another indictment of the crime which he actually committed, but under this indictment the proof failed to show any offense.

A. Oakey Hall, district attorney, for the people.—The request was properly refused, because it took away from the jury their consideration of all responsibility on the part of prisoner. The request was substantially to charge that the prisoner cannot be convicted of shooting Mrs. Bayley. Pursuant to the common law, our statute will construe the intent to kill under these facts, to be common, not only to the person aimed at but to the person injured. If A., intending to kill B., fired at B., but missing him, killed C., it was murder at common law. 1 *Whar. Am. Cr. Law*, § 965. Our statute says: "when perpetrated from premeditated design to effect the death of the person killed, or of any human being." This question was construed by this court in accordance with the common law, as above stated. People *v.* Darry, 10 *N. Y.* 155.

BY THE COURT.—PECKHAM, J.—The statute under which this indictment was found declares, among other things, that "every person who shall be convicted of shooting at another, &c., with the intent to kill, maim, ravish or rob such other person," &c., shall be punished by imprisonment in a State prison not more than ten years. 2 *R. S.* 665.

The prisoner was indicted under this statute. To convict him thereof it mus be proved that he violated some one of its provisions. It would seem that shooting at Bayly with intent to kill him, and hitting Mrs. Bayly by mere mistake, does not prove him guilty of shooting at her with intent to kill her. But it is equally clear, however, that the prisoner might have been convicted under this indictment, of another offense than that described in this statute. At common law, feloniously or unlawfully firing or striking at one and hitting another, is an offense as to the latter, of which the prisoner might have been

convicted under this indictment. The request of the prisoner was, in substance, to charge that the prisoner could not be convicted of any offense for shooting Mrs. B. The request was too broad, and the court therefore committed no error in refusing such charge. Irrespective of this objection no material error is presented in this record for review, at least none in my judgment appears.

The judgment is affirmed.

All the judges concurred, except MORGAN, J., who was for dismissal of the writ.

Judgment affirmed.

HONEGSBERGER *v.* SECOND-AVENUE RAILROAD COMPANY.

December, 1864.

Reversing 1 *Daly*, 89.

The rule that one who sues for damages for a personal injury sustained by defendant's negligence, must have been free from negligence upon his own part, applies where the person injured is an infant, the same as where he is an adult.

The plaintiff allowed his son six years of age to go to and from school through the streets of a crowded city without a protector, and the son was run over by the defendants. *Held*, that if the neglect of the boy to exercise the degree of care which an adult of ordinary prudence would use, contributed to the injury, the father could not recover.*

David Honegsberger sued the Second-avenue Railroad Company, in the New York common pleas, for damages which he had sustained by the injury of his son Solomon, a lad of six and a half years of age, by being run over by defendants' car.

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*Compare the following cases: Jetter v. N. Y. & Harlem R. R. Co., and Mentz v. Second-Ave. R. R. Co., both reported in this series; Mangam v. Brooklyn R. R. Co., 38 *N. Y.* 455; Bulger v. Albany Railway, 42 *Id.* 459; Sheridan v. Brooklyn, &c. R. R., 36 *Id.* 47. Consult also on this subject, 8 *Gray*, 123; 9 *Allen*, 401; Robinson v. Cone, 22 *Vt.* 213; Daly v. Norwich, &c. R. R. Co., 26 *Conn.* 598; Robinson v. Coe, 23 *Penn.* 226; Rauch v. Lloyd, 31 *Id.* 358, 370; Penn. R. R. Co. v. Kelly, *Id.* 372; Phil. R. R. Co

The lad was returning from school, in the city of New York, at three o'clock in the afternoon of a day in May, 1857. As he was crossing Second-avenue, near Ninth-street, on his way home, he was run over by one of the defendant's cars. At the time of the accident the driver of the car was conversing with a passenger, and had his face turned away from the horses, and did not notice the boy on the track until his attention was called to him by a passenger. There was conflicting evidence as to whether the driver could have stopped the car in time to have prevented the accident.

The judge charged the jury that it was necessary for plaintiff to prove that the injury was produced by the *exclusive* negligence of the defendants, and that the boy's negligence did not contribute to it. "But in determining what would or would not be negligence on the part of the boy, it is not to be understood that a child of the age of the boy is to be held to the same degree of caution, foresight and discretion that would be exacted from an adult. If the child has arrived at an age in which his parents, in the exercise of sound discretion, are justified in permitting him to go to school alone and unattended; if they are chargeable with no negligence in suffering him to do so, the child, while in the public streets, is to be held only to the exercise of that caution and discretion of which children of his age are presumed to be capable. If he does that, it is all that the law can require. There may be cases in which an adult, in going through, or crossing the public street, would be expected to exercise a degree of discretion and judgment, in respect to the safety of his person, or to avoid accidents, which could not, to the same extent, be expected from a child, though he had arrived sufficiently at years of discretion to justify his parents in allowing him to go into the public streets alone, especially in going to and from school."

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v. Spearen, 47 *Id.* 365; Smith v. O'Connor, 48 *Id.* 218; North Penn. R. R. Co. v. Mahoney, 57 *Id.* 187; Carter v. Towne, 98 *Mass.* 568; Grill v. Gen. Iron Co., *Law Rep.* 1 *Com. Pl.* 600: *Exch. Ch.* 3 *Id.* 476; O'Flaherty v. Union R. R. Co., 3 *Am. Law Times R.* 42; Boland v. Missouri, 36 *Mo.* 490; City of Chicago v. Mayor, &c., 18 *Ill.* 360; 42 *Id.* 356; City v. Kirby, 8 *Min.* 169; Whirley v. Whittemore, 1 *Head* (*Tenn.*) 620; B. & I. R. R. Co. v. Snyder, 18 *Ohio St.* 399; Ihl v. Forty-second Street R. R. Co., 47 *N. Y.* 317.

To this, defendants excepted; and requested the judge to charge that it was negligence on plaintiff's part to allow his son, a lad six years of age, to be in the crowded streets of the city without a protector. This the judge refused, and defendants excepted.

Under the instructions of the judge, the jury awarded plaintiff as his damages the amount of his expenses in consequence of the injury.

The common pleas, at general term, on appeal from an order refusing a new trial, held, that if a child which the law considers of sufficient age to go alone in the public street, exercises the caution of one of its years, this is all that the law requires of it. The defendants appealed.

John K. Porter and *Waldo Hutchins*, for defendants, appellants;—Cited Haring *v.* N. Y. & E. R. R. Co., 13 *Barb.* 9; Sheffield *v.* Rochester & Syracuse R. R. Co., 21 *Id.* 339; Wilds *v.* Hudson River R. R. Co., 24 *N. Y.* 430; Ernst *v.* Same, 24 *How. Pr.* 97; 98 *Eng. Com. L.* 566; Hartfield *v.* Roper, 21 *Wend.* 615; Brown *v*, Maxwell, 6 *Hill*, 592; Kreig *v.* Wells, 1 *E. D. Smith*, 74; Munger *v.* Tonawanda R. R. Co., 4 *N. Y.* (4 *Const.*) 359.

Andrew Boardman, for plaintiff, respondent;—Cited Bernhardt *v.* Renss., &c. R. R. Co., 19 *How. Pr.* 139;* Wilds *v.* Hudson River R. R. Co., 33 *Barb.* 503; Mangam *v.* Brooklyn City R. R. Co., 36 *Id.* 230; Oldfield *v.* N. Y. & Harlem R. R. Co., 3 *E. D. Smith*, 103; 14 *N. Y.* 310.

BY THE COURT.—HOGEBOOM, J.—The charge of the judge, as construed in the light of the evidence, must be considered as applied to a child of some six or seven years of age. That was the age stated in the plaintiff's complaint and not denied in the answer, and assumed in the defendants' request to charge the jury and not then controverted. So understood, and remembering also the fact that the father and not the child is the plaintiff in the action, I am of opinion that the charge was

* See vol. 1, p. 131, of this series.

erroneous. Even as applied to the child if he had been plaintiff, I do not see how such a charge could be sustained if we adhere to the case of Hartfield *v.* Roper, 21 *Wend.* 615, decided five and twenty years ago, and followed in subsequent cases. See 5 *Hill*, 282; Brown *v.* Maxwell, 6 *Id.* 592; Spencer *v.* Utica R. R. Co., 5 *Barb.* 337; 27 *Id.* 228; Button *v.* Hudson River R. R. Co., 18 *N. Y.* 248, 251; Steves *v.* Oswego & Syracuse R. R. Co., *Id.* 422; Munger *v.* Tonawanda R. R. Co., 4 *Id.* 349; 1 *E. D. Smith*, 74.

In Hartfield *v.* Roper, the infant himself, a child of about two years of age, was the plaintiff, and Justice COWEN, speaking of the rule that a negligent party cannot recover damages consequent upon a collision on the highway, says: "The application may be harsh when made to small children; as they are known to have no personal discretion, common humanity is alive to their protection, but they are not therefore exempt from the legal rule when they bring an action for redress; and there is no other way of enforcing it, except by requiring due care at the hands of those to whom the law and the necessity of the case has delegated the exercise of discretion. An infant is not *sui juris*. He belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose, and in respect to third persons, his act must be deemed that of the infant; his neglect the infant's neglect." "It is plain in the nature of things that if an infant insist on a right of action he must show a compliance with the conditions on which his right is to arise, and this is entirely irrespective of his age."

In Munger *v.* Tonawanda R. R. Co., 4 *N. Y.* 349, Judge HURLBUT, in delivering the opinion of the court, while speaking of the general rule that in actions for negligence the person bringing the action must be free from negligence contributing to the injury, remarks as follows (p. 359): "Lord DENMAN, in Lynch *v.* Nurdin, 1 *Ad. & E.* 29, allowed an exception in favor of the plaintiff, a child seven years old, who received an injury by getting into the defendant's cart, which was carelessly left in the street. This decision has not, however, been followed in this State; but the negligence and imprudence of the parents or guardians in allowing a child of tender years to

be exposed to injury in the highway has been held to furnish the same answer to an action by the child, as the negligence or other fault of an adult plaintiff would have done in a similar case. Hartfield *v.* Roper, 21 *Wend.* 615; Brown *v.* Maxwell, 6 *Hill*, 592."

In Willetts *v.* Buffalo & Rochester R. R. Co., 14 *Barb.* 585, 592, the same rule was applied in the case of a lunatic, who, being in company with his father on a railroad train, was temporarily left by the latter, who stepped off the car to procure some refreshment, and during his absence the lunatic being applied to by the conductor for his fare, refused to pay the same, and thereupon was ejected from the car, and was run over by another train of cars and killed.

If, therefore, the infant had been plaintiff, and had been guilty of negligence, he could not recover under the law as it is administered in this State; and if he could not recover, the father cannot recover. His right of action is no greater than that of the infant would be, for he claims through the infant and upon the theory that the infant is free from blame. There may possibly be some reason for saying that as he adopts the act of the infant and seeks to derive benefit from it, he must be considered as in the place of the infant, and responsible for negligence in the same way as if he had been the party injured. But it is not necessary to decide that question.

The point then to be determined is, what would be the degree of care which would be required of the infant to exempt him from the imputation of negligence. I know of but one rule on the subject as the law is held with us, and I think it applies to all persons without exception and makes no discrimination on account of age. It is that degree of care which a person of ordinary prudence would exercise in the situation supposed. There is no other safe rule. No other rule would protect the community. An infant of tender years, incapable of exercising requisite discretion, is not to be permitted to occupy the highway for the purpose of entitling himself to an action for injury except upon the condition of being subjected to the consequences of negligence attached to persons in general. Otherwise the tenderer the age and the less the discretion, the more perfect and frequent the cause of action, because more easily

sustained and oftener occurring. Such a rule is not capable of safe practical enforcement.

I think this position is not answered by saying that the charge assumes that the jury should find the plaintiff free from negligence in sending the boy to school unprotected. The defendant asked the court to charge that such act of the father in sending so young a child to school through so crowded a thoroughfare as the streets of New York, without a protector, would be in itself negligence. The court refused so to charge, and the defendants excepted. But assume that such conduct might not be subject to the imputation of negligence, that is that a prudent person might send his boy of six years old to school alone through the streets of New York, it does not follow that this particular act is from negligence, nor such as would be likely to be practiced even by boys of that age. Nor does it follow that even for purposes of education such conduct on the part of the father should not be discouraged, that it is not subject to the condition that if the infant in fact becomes guilty of negligence, and in consequence thereof suffers a personal injury, he is not to take advantage of his own wrong, and thereby entitle himself to an action for redress. The charge must be read, I think, as speaking of negligence in a general way, in reference to a general practice of sending children of such an age to school, as not censurable, and not as applied to the actual circumstances of the present case. I think the judgment should be reversed and a new trial granted, with costs to abide the event.

A majority of the judges concurred.

Judgment reversed, and new trial ordered, with costs to abide event.

HOPE MUTUAL INSURANCE *v.* PERKINS.

December, 1868.

Affirming 4 *Bosw.* 18.

An insurance company, as incidental to its general powers and in the absence of any positive restriction, has a right to receive a promissory

note from one of its trustees, as a part of a guaranty fund, and such note is a valid security in the hands of a receiver for the benefit of the company's creditors.

The act of the company in undertaking business in another State under an act of the legislature thereof requiring other and special security, does not exonerate the signers of such a guaranty from liability thereon, at least in respect to policies not issued in such State.

The inducement held out to the public to insure, by reason of the security afforded by the guaranty, is a sufficient consideration, or furnishes the ground for an estoppel.

The return of an execution unsatisfied and the appointment of a receiver are *prima facie* evidence of a want of assets.

On a promissory note given as a contingent guaranty, and payable according to assessments to be made after other assets are exhausted, the statute of limitations does not begin to run until that contingency occurs.

The Hope Mutual Insurance Company sued Dennis Perkins, in the New York superior court, to recover the amount of a promissory note, made by the defendant, in pursuance of an agreement entered into by defendant and others with the plaintiff.

The plaintiff was incorporated by a law of the State of Connecticut, in May, 1846. By the charter, subscriptions for policies to the amount of one hundred thousand dollars were required before organization. This provision was complied with, and the company organized and went into operation on March 15, 1847. The defendant was appointed one of the trustees of the company, and continued to act as such for some time.

At a meeting of the board of trustees, held on March 26, 1847, for the purpose of providing a sufficient fund for losses which might accrue upon policies thereafter issued, the following resolution was passed:

Resolved, That it is desirable to raise a guarantee fund of from fifteen thousand dollars to fifty thousand dollars, upon such securities and on such terms and conditions as are not at variance with the charter and by-laws of this company; and that the executive officers in Stamford be authorized to receive subscriptions to the same, and with the advice of the supervisory committee, to accept such as they approve of.

* See Sands v. Lilienthal, 46 N. Y. 541; Wheeler v. Warner, 47 Id. 519; and cases cited.

It was also resolved, that no policies should be issued until subscriptions had been obtained to that fund, and the notes, mortgages and other securities approved and actually received to the amount, with the premiums or policies really to be issued, to the sum of twenty-five thousand dollars.

At a subsequent meeting of the trustees, this sum was reduced to fifteen thousand dollars. At a still later meeting, on April 19, 1847, the defendant and others, for the purpose of creating the guarantee fund and of enabling the company to issue policies, and for the security of such as should become insured, proposed to the company to subscribe, and did subscribe, the agreement hereinafter set forth, and to contribute to the guarantee fund in the manner therein provided. This proposition was accepted, and the defendant and others severally executed and delivered to the company the following agreement:

"Whereas, it has been deemed advisable by the Hope Mutual Life Insurance Company, of Stamford, Connecticut, to create a fund for the indemnity of persons insured by said company, as a security in addition to expected profits;

"The subscribers hereto have agreed with the said company, to contribute to the said fund the amount respectively set opposite their names, by giving their promissory notes, payable in one year, upon the conditions that the same shall be held by the said company for the sole purpose of paying losses which shall accrue upon the policies assured by the said company, and shall *not be used until the other funds in the hands of said company shall have been first applied*; that for any deficiency after the application of the said funds on account of such losses, the said notes *shall be subject to assessment for the amount required*; that the said indemnity fund shall in no event be liable for the expenses of the said company, or claims against them, other than those arising upon policies issued by them, and in the latter case, only *after all other funds of said company have been exhausted*; that for the loan of said notes the subscribers shall be entitled to an allowance at the rate of six per cent. per annum, so long as the said company shall hold the said security; that *whenever a surplus of capital shall have been acquired by the company out of the profits of business, to*

the amount of twenty-five thousand dollars, the indemnity herein provided shall cease, and the notes or other securities shall be returned to the subscribers respectively; it being, however, understood that the subscribers hereto may, in lieu of having such return, absorb the amount of their notes in premiums of policies on their own lives, or lives of others procured through their agency.

"To which terms and conditions the said company assent and agree to hold the said security in conformity thereto.

"STAMFORD, April 19, 1847."

In pursuance of said agreement, the defendant soon afterwards executed and delivered to the company the following note.

"$2,500. "NEW YORK, May 1, 1847.

"Twelve months after date, or sooner, if required, I promise to pay to the Hope Mutual Life Insurance Company, of Stamford, Connecticut, or order, two thousand five hundred dollars, or such assessments on the same as the trustees find it necessary to impose for the purpose of paying losses, agreeably to the terms of my subscription to the guaranty fund of said company, dated April 19, for value received.

"(Signed) DENNIS PERKINS."

The existence of this fund was announced in the newspapers, one in New York, and one in Connecticut; reported to the legislature of the State of Connecticut and advertised in pamphlets in 1847 and 1849. The defendant received a percentage on his note, and had the interest credited to him for premium on his policy.

In 1849, after the passage of an act of the legislature of this State, which is referred to in the opinions, certain persons in the city of New York, with a view of inducing the company to continue its business there, proposed to furnish an additional guarantee to the amount of one hundred thousand dollars.

Securities were furnished accordingly, and the facts in reference to this branch of the case are sufficiently stated in the opinion.

In May, 1850, the company, by its report, showed the profits

of its business to be twenty-five thousand four hundred and seventy-nine dollars and fourteen cents, which was made up as follows:

Cash on hand, ...	$5,813 84
Premium notes, ...	14,149 41
Due from agents, ...	5,515 89
	$25,479 14

The report also shows losses notified, part of which are

awaiting proof, ...	$11,000
Less amount not recognized, ...	6,500
	$4,500

In May, 1854, it was found that the company was *entirely insolvent; all its assets, except the guaranty fund*, having been exhausted, and there was a large outstanding indebtedness for losses and other debts. W. T. Minor was appointed by the superior court of Fairfield county, Connecticut, the receiver of the assets of the company, including the guaranty notes; and an assessment of seventy-five cents on the dollar was laid on the guaranty notes, of which the defendant received notice in December, 1854, or January, 1855.

Upon the trial, the evidence being closed, the defendant's counsel moved for a dismissal of the complaint on several grounds, and requested the court to instruct the jury upon various propositions, all of which were refused and exceptions duly taken. The points taken, and the propositions presented and decided, appear in the opinions. The judge directed a verdict for the plaintiff for three thousand one hundred and sixty nine dollars and twenty-four cents, the amount claimed, to which also the defendant excepted. The case was heard on exception at general term, a new trial denied, and defendants appealed.

A. H. Dana, for defendant, appellant.

Truman Smith and *Cephas Brainard*, for plaintiffs, respondents.

MILLER, J.—It is at least exceedingly questionable, whether the note upon which this action is brought is strictly within the provisions of the act under which the plaintiff was incorporated. The eighth section of said act provides that "the company, for the better security of its dealers, may receive, during the two first years after the passage of this act, notes or other securities, for premiums in advance, of persons intending to receive its policies, and may negotiate the same for the purpose only of paying claims against it in the course of its dealings, upon such terms and conditions as may be provided by the by-laws of this corporation." The thirteenth section authorizes an allowance to persons giving notes and securities in advancee therefor of a sum not exceeding six per cent., in addition to any other profits they may be entitled to, as members of the company. The seventeenth section provides for the assessment of losses upon these persons or their legal representatives who have notes or other obligations, due by them to the company, when there is a just claim on the company for losses sustained to a greater amount than they have funds to discharge.

It is by no means clear to my mind, that the note in suit, with the accompanying stipulation, was an obligation within the spirit or meaning of the act in question, or which was contemplated by the eighth section of the plaintiff's charter. The language of the act embraces obligations given for premiums paid in advance with a view of taking out policies, and nothing beyond this, and the notes and obligations provided for were from persons who intended to take out policies, and who thereby became members of the company and were entitled to share in the profits of the business.

The note in question provides for the payment of losses, agreebly to the terms of the subscription to the guaranty fund of the company, and the agreement accompanying, and which constituted a part and portion of it, prescribes conditions which are manifestly inconsistent with the idea that it was intended to take out policies, as the provision of the eighth section contemplated. The note was not to be used until other funds of the company had been applied; the indemnity provided was to cease when the profits of the business amounted to a certain sum, and the security was to be returned to the maker. It is

true the maker had the privilege, in lieu of the return of the note and security, to absorb the amount in premiums; but it was a mere privilege, allowing him to take out policies at his option, without any obligation whatever to do so. It is quite evident that the note was given and the agreement entered into, for the purpose of providing a special guaranty fund, as a security to those who might obtain policies and for losses which might be incurred independent of the profits arising out of the ordinary course of the business of the company. At the time, this was essential to create confidence in the responsibility of the company, and thus to induce persons to take out policies. But it is very manifest that it was not the intention of the parties making the notes and signing the guaranty to take out policies, as the act provided, and hence the engagement entered into by them did not come within its provisions. Some decisions in this State are supposed to sustain the position that the note in question was in conformity with the charter; but upon examination, I think they do not uphold such a doctrine. In Desvraimes *v.* The Mechanics' Insurance Co., 1 *N. Y.* (1 *Const.*) 371, a note was given in renewal of a note previously executed, in accordance with the provisions of the twelfth section of the charter of the company, which is similar to the eighth section of the plaintiff's charter. The note was absolute on its face, and an agreement was executed in connection with, and as a part of it, which provided that it was for premiums on risks to be taken by the company, and contained other provisions, showing that polices were to be issued to the maker of the note. Policies were taken out to a certain amount. It was not denied that, to that extent, the note was valid, and it was held, that the notes being held for premiums in advance, as provided by the act, and policies having been taken out, it was valid, although premiums on insurances actually received by the maker amounted to only a part of the note.

In Brown *v.* Cooke, 4 *N. Y.* (4 *Comst.*) 51, a note was given in advance for premiums on policies of insurance, which the party agreed to take thereafter, and it was held to be valid. The defendant did not take out policies, as he had a right to do, but was bound to do so, and hence was liable, precisely the

same as if he had done so. In these cases the policies were actually taken out, or there was an obligation to do so, which no doubt could be enforced, while in the case before us, no such obligation was imposed, or actually existed, and it was entirely left to the choice of the defendant whether any policies were taken out by him.

There may be some question whether the defendant is not liable upon another principle. He was one of the trustees at the time when the resolution was passed which authorized the raising of a guaranty fund, "upon such terms and conditions as are not at variance with the charter and by-laws of the company." If the creditors were induced to give credit to the company on the strength of that resolution, passed with the acquiescence and consent of the defendant, is it not a fair presumption, as between the creditors and the defendant, that the note was given in conformity with the charter and by-laws of the company? In Ogden *v.* Andre, 4 *Bosw.* 583,* it was held, that a person who in good faith lent money to the International Insurance Company, on the transfer of its subscription notes as collateral security, without notice of any fraud affecting the origin of the notes, or that they were transferred without any previous resolution of the board of directors of such company, is entitled to recover upon them, although they may have been procured from the maker by fraud, and although there may have been no such resolution authorizing the transfer.

The case was affirmed in the court of appeals, and there appears to be no valid reason why the principle decided should not be applicable to a case like the present, if the credit was given upon the faith of the fund of which the note in question was a part. That such was the case is fairly to be inferred, I think, from the fact that the company gave notice in the most public manner, that, for the greater security of the parties insuring, an indemnity fund had been provided of twenty thousand dollars, to meet losses that might accrue upon policies issued by them, which was to remain until a capital exceeding that amount should be realized from the receipts of premiums, when it would be no longer necessary and might be withdrawn. It may also be questionable whether the resolution of

* See Ogden v. Raymond, in this series.

the trustees, in the passage of which the defendant participated, or of which he had knowledge, and which provided this fund, does not estop him from now averring that the note was unauthorized and in violation of the charter, as a defense to an action prosecuted for the benefit of creditors.

Passing by, however, these considerations, which have a direct bearing upon the question now presented, I think that the action is maintainable upon other and stronger grounds. The plaintiff was incorporated for the purpose of transacting the business of life insurance, and in order to carry on this business properly and successfully, it was absolutely essential to provide a fund for the payment of losses which might be incurred, before a sufficient amount could be realized by the receipt of premiums on policies issued to persons insured alone. The trustees had ample authority to procure security to policy holders for losses which might accrue, and it would have been perfectly legitimate to pledge any property which they owned for that purpose, or to procure a proper guaranty from other parties which would insure safety and security to those obtaining policies. Under these general powers, which are incident to all corporations, thus to provide for the transaction of their business, I think that the plaintiff had a right to receive the note in question as a part of a guaranty fund, and it was a valid security in the hands of a receiver for the benefit of the creditors of the company. This principle has been upheld by the highest tribunal of the State of Connecticut, in a case in which this corporation was a party.

In the Hope Mutual Life Insurance Co. *v.* Weed, 28 *Conn.* 51, an action was brought to recover the amount of a note executed as a part of the guaranty fund of the company, and it was decided, that whether the company had express authority by its charter to establish such a guaranty fund or not, yet it clearly had the power, as incidental to the general power to issue policies of insurance; that the note in question was founded on a valid consideration, not only in the commission agreed to be paid, but especially in the object for which it was given, that object being to induce persons to insure in the company, and the amount assessed being required to pay the losses for policies taken under that inducement.

The able opinion of Chief Justice STORRS, in the case cited, contains a full discussion of ths subject, and furnishes strong and satisfactory grounds for sustaining an action upon a note given under the circumstances existing in this case. Nothing can be added to the reasons stated for the conclusion arrived at in the case cited, and I concur generally with the views there expressed. As the adjudication of thehighest court of a State from whose authority the plaintiff derived its corporate powers, it is entitled to great consideration, and should not be overruled unless it be for manifest error, which I have not been able to discover.

It is insisted by the defendant's counsel, that the case cited is distinguishable from the one at bar, but I see no essential difference in the main features. It can fairly be claimed in both cases from the circumstances existing, that when the company was first organized and until the guaranty was provided, that applications for policies were not very numerous, owing mainly to the fact that a sufficient fund was not provided to meet losses which might be incurred. Nor am I able to discover, as is claimed, that the court, in the opinion delivered in the case cited, overlooked the rights of the parties who had contributed to the guaranty notes.

It is further insisted by the defendant, that even if the note and guaranty had been originally valid, it was annulled and became inoperative by the subsequent change in the condition of the company by reason of an act of the legislature of this State, passed April 10, 1849. By the act in question, it was made unlawful for any agent or agents of insurance companies to transact business in this State, unless possessed of capital or securities to the amount of one hundred thousand dollars, paid in or invested in stocks of incorporated cities, or of the State or the United States, or in bonds and mortgages on cultivated farms worth double the amount. And this was to be proved to the satisfaction of the comptroller of the State, and to be certified by him in the manner provided for by the act. *L.* 1849, p. 433, §§ 6, 7. The company had previously transacted business in New York city, and the act in question rendered it necessary to withdraw its office located there until the security was provided.

In the fall of 1849, an attempt was made to continue business under the act referred to, and the agents of the company afterwards appointed undertook to procure a guaranty to the amount required, and to obtain the certificate of the comptroller, so as to enable the company to transact business agreeably to the laws of the State. Securities were furnished by said agents, and on September 25, 1849, a report was made by the secretary of the company, duly verified, showing that it had the amount required. This was duly filed, and a certificate was obtained from the comptroller, according to the requirements of the act. The trustees of the company reserved, however, the right to require additional security, and to reject the securities furnished, as they deemed expedient, and it turned out upon investigation that they were worthless and of no value. The arrangement was then broken up, and on January 11, 1850, the securities were returned, and the business in New York was discontinued.

The position taken by the defendant's counsel is, that this attempt to continue business in New York was without his consent, and he cannot be held liable upon his guaranty for any liability accruing after that time. The answer, it seems to me, is, that there is no evidence to show that the arrangement was ever actually consummated. It was only inchoate, and the securities being unsatisfactory, was then abandoned. It was repudiated, after its fraudulent character was discovered.

But suppose the business was conducted in violation of law, in consequence of the fraud perpetrated by the agents of the plaintiff, does that fact exonerate the defendant? The principle invoked by the defendant is laid down in the H. & N. H. R. R. Co. *v.* Crosswell, 5 *Hill*, 363, that in general, if a corporation procure an alteration to be made in its charter by which a new and different business is superadded to that originally contemplated, such of the stockholders as do not assent to the alteration will be alsolved from liability on their subscriptions to the capital stock, especially if the alteration become plainly prejudicial to their interests. It can scarcely be said that the arrangement to conduct business in New York was a new or different business from that originally designed, as the same business had been conducted there prior to the act of 1849. That

act merely required proof of the responsibility of the company, and the transaction of business by reason of this provision did not add in any way to the risk of the guarantees. It was not then a change of the charter, or a different business superadded, but an effort to do business without a compliance with the law, by fraudulent practices, which were abandoned by the trustees soon after its inauguration. If the security had been valid, it would have been clearly legal, and I am not prepared to say that the principle invoked was violated, even if any additional liability had been imposed upon the defendant by the attempt to establish an agency in New York. The guaranty fund was intended to be used to secure such persons as were insured by the company in the legitimate and ordinary course of its business. This business was not necessarily limited to any particular place, or to the place where the principal office was located, but embraced such other extension of it as might be consistent with the success and prosperity of the corporation. The agency in New York, was not, in my opinion, especially prejudicial to defendant's interests, and did not particularly impair his rights.

It is also objected by the defendant, that even if the note was valid in its inception, it was afterwards annulled, according to the terms upon which it was given. These conditions were, that the note was to be returned and the indemnity to cease whenever a surplus capital should have been acquired by the company out of the profits of the business to the amount of twenty-five thousand dollars. It is claimed that the report made by the company to the legislature of the State of Connecticut on May 1, 1850, shows a net amount earned beyond the sum named, and thus the defendant was exonerated from liability It does not appear that the defendant at any time asked or demanded a return of the note, for the reason that the profits amounted to the sum named, or that the company had acquired "a surplus capital to the amount of twenty-five thousand dollars out of the profits of the business," in accordance with the condition named. As will be seen by reference to the report, the amount of twenty-five thousand four hundred and seventy-nine dollars and twenty-nine cents, reported as net proceeds consisted of several items; cash on hand; premium notes, and dues from agents. Against this, the report shows losses notified, part of

which were awaiting proof, to the amount of eleven thousand dollars less the amount not recognized, six thousand five hundred dollars, leaving four thousand five hundred dollars to be deducted for losses which were recognized. This shows a less amount of profits than the amount named in the guaranty. It is at least quite doubtful whether the premium notes are of the value stated, and it is not satisfactorily established in my opinion, that the company at this time had a surplus capital arising from the profits of the business over and above all obligations, and to the amount stated in the report. This was intended, and from the proof in the case we cannot say such was the fact.

It is also contended that the guaranty fund was to be available only after other assets were exhausted, and that it has been shown that the company were at one time possessed of a large amount of securities which they do not account for. It is apparent, I think, that there were no assets which could be applied in payment of the debts of the company. The return of an execution unsatisfied, shows that there was no property out of which a judgment against the plaintiff could be collected, and the appointment of a receiver establishes the insolvency of the corporation. These facts furnish at least *prima facie* evidence of a want of assets, and until some proof of their existence it cannot be assumed that there was property. The proof also abundantly establishes, I think, that all the funds and property except the guaranty notes had been applied and were exhausted.

The evidence as to whether a capital of twenty-five thousand dollars had been acquired by the company, and whether the plaintiff had exhausted all other assets before assessing the guaranty note, as well as the main facts involved, was uncontradicted, and there was no disputed question of fact for the jury to pass upon.

I think that the statute of limitations commenced running after the assessment was levied and the defendant was notified. By the terms of the guaranty, no assessment could be made until the other funds of the company had been disposed of in the payment of debts, and nothing was due upon the note until such assessment was actually made. See 28 *Conn.* 68. The

note, according to the conditions attached, was only payable on a contingency, not absolutely, and until that happened was not due.

There was no error committed upon the trial, and the judgment must be affirmed.

GROVER, J.—It is insisted by the counsel for the appellant that the plaintiff had no power to receive the note in suit for the purpose of creating a fund to secure the payment of losses incurred upon policies issued by the company, and that the note is therefore void. The respondent cannot insist that this power is conferred by section 8 of the charter. This section authorizes the company to receive notes of parties for premiums on policies thereafter to be issued, and makes notes thus received available in the hands of the company for the payment of its liabilities, although the policies have never been issued, and no premiums been allowed thereon. This provision was necessary to prevent such notes being held without consideration. But the note in suit is not one of this class. It was not given as an advance payment of premiums upon policies thereafter to be issued. It is not, therefore, within the provisions of the eighth section of the charter, and must be held void unless it can otherwise be upheld. The note in suit was, with others, given by the makers and received by the company for the purpose of creating a guaranty fund to policy holders for the prompt payment of losses in the absence of other means of the company for that purpose, and thus giving the company credit with the public.

The question is, whether this is within the general powers of the corporation. The counsel for the appellant refers to the Revised Statutes (vol. 2, p. 660, §§ 1, 3), for the purpose of showing that it is not. The plaintiff was not incorporated by the laws of this State, but by an act of the legislature of Connecticut. It is to the laws of the latter State to which we must look to determine whether there was any restriction of the general powers of corporations imposed upon the plaintiff. No such restriction is claimed.

It is conceded that corporations, in the absence of restrictions imposed by statute, have the power necessary to enable them to transact the business authorized by their charter. The

plaintiff, by its charter, was authorized to conduct the business of life insurance. It possessed little or no available capital. It became necessary for it to acquire credit with the public. The most feasible way of doing this was to procure persons of respectability to guarantee the performance of its contracts. This, corporations may do whenever necessary. They may borrow money for the purposes of their business, and for the like purposes procure sureties, and the contracts of the latter are valid, the same as if made with individuals. The effect of the arrangement made by the plaintiff with the maker of the note in suit, and other makers of like notes, was to make the latter sureties of the company to the policy holders for the payment of losses. This was within the general powers of the plaintiff. This precise question came before the supreme court of Connecticut in a case submitted by the present plaintiff and Weed (28 *Conn.* 51), and the power of the corporation to take the note was sustained. I think the reasoning of the court in that case unanswerable. It is unnecessary to determine whether the Revised Statutes prohibit such a corporation from exercising similar powers, and I shall not discuss that point.

It is further insisted by the counsel for the appellant, that the act of 1849, of this State, prohibiting foreign corporations like the plaintiff from doing business in this State, discharged the makers of notes like the one in suit from further liability thereon. I cannot concur in this position. The makers became sureties to policy holders in effect, whenever and wherever policies were lawfully issued. Conceding that the act made it unlawful for the plaintiff to transact business in this State until it had acquired a capital of one hundred thousand dollars, as required by the act, yet this could not affect the liability of the makers upon policies lawfully issued elsewhere. Whether any policies were issued in this State in contravention of the statute does not appear. If there were, such policies were void, and the makers of the notes incurred no liability thereon.

It is further insisted that the notes were without consideration. By the contract, the plaintiff was to pay each maker respectively six per cent. per annum upon the amount of his note while retained by the company. This was a sufficient consideration for their becoming surety.

Again: the notes were given to give the company credit with the public, and thus induce individuals to insure with it. The presumption is that they were thus induced to insure. This was a sufficient consideration to sustain the contract of the makers of the notes.

The notes by the contract were not payable until the avails were required by the company for the payment of losses. This did not occur six years prior to the commencement of this action. The statute of limitations did not, therefore, constitute a defense.

The securities furnished by Cazeneu and Edwards to the company to enable it to comply with the statute of this State, so as to authorize the transaction of business by it, did not discharge the makers. These securities clearly were not profits earned by the company; at most, they constituted a loan to the company. What finally became of these securities does not distinctly appear, except that they got back to the possession of Cazeneu and Edwards. The case does not show that any portion of these securities was available for the payment of losses upon policies, but the reverse. There was no evidence that the profits of the company at any time amounted to the sum of twenty-five thousand dollars.

The judge did not err in refusing to submit this question to the jury. The defendant had no right to set off against the note the balance due him from the company on account of the six per cent. per annum agreed to be paid to him by the company while the latter retained the note; such right would be in contravention of the contract of the parties. By that contract, the entire principal of the note was to be available in the hands of the company for the payment of losses upon policies. If the makers had the right of set-off of demands owing them by the company, the object of giving the note and the security of policy holders would be entirely defeated.

The judgment appealed from must be affirmed.

All the judges concurred with MILLER, J.

Judgment affirmed, with costs.

HORNER *v.* LYMAN.

December, 1868.

The sureties in an undertaking given for the payment of such judgment as may thereafter be awarded in an action, are not discharged from liability on the undertaking by the fact that under a statute passed after the undertaking was given, the court awarded damages by way of costs, as a part of the judgment, which were not authorized by law at the time of giving the undertaking.

The obligation of sureties in such an undertaking is to be interpreted by the law as it exists at the time they are called upon to perform it.

James Horner and James Ludlum, brought two actions against David H. Lyman and Richard L. Allen, in the supreme court, on two undertakings given pursuant to the provisions of the Code of Procedure, in previous actions. The present actions were consolidated and tried before a judge, who found that in 1855 the plaintiffs, (with one Grant, whose administrator subsequently assigned the cause of action to plaintiffs,) recovered two judgments against certain third persons, and the latter appealed therefrom, and for the purposes of the appeal the present defendants gave the undertakings sued on, by which they bound themselves "that the said appellants will pay all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars, and do also undertake, that if the said judgment so appealed from, or any part thereof be affirmed, the said appellants will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellants on the said appeal."

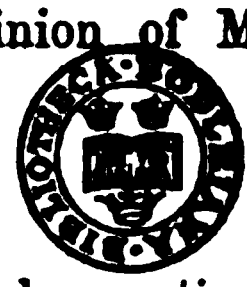
The undertakings were given in 1857. In 1858, the legislature passed an act authorizing the appellate court, on affirming a judgment, to award damages to the respondent, for the delay, not exceeding ten per cent. on the amount of the judgment.

In 1861, the appeals in question were heard, and the court affirmed the judgment, with costs, and with the ten per cent. damages which the statute permitted.

The sureties now being sued on their undertaking, objected that by the enlargement of the power of the court, and the increased liability attempted to be imposed on them, they were discharged.

The *supreme court* held the defence untenable, and gave judgment for the full amount claimed. Defendants appealed.

John K. Porter, for defendants, appellants;—Reviewed the history of the allowance of damages on appeal, and insisted that even if the amendment of the law could be deemed retrospective, it could not bind the sureties. (See principal authorities in memorandum of the dissenting opinion of MILLER, J., below.)



E. Wells, for plaintiffs, respondents.

BY THE COURT.—GROVER, J.—The only question discussed by the counsel for the appellants was, whether the defendants were discharged as sureties upon the undertakings given upon the appeals to the court of appeals, by reason of the allowance by the court of five per cent. upon the judgments appealed from, to the respondents, as damages, by virtue of L. 1858, p. 493, § 11, subd. 6. The other questions raised upon the trial were not insisted upon by the counsel, and there is nothing requiring consideration in any of them.

The section above referred to was passed during the pendency in the court of appeals of the cases in which the undertakings were given. It is insisted by the counsel for the appellant, that the statute in question can only be applied prospectively to cases where the appeal was brought after its enactment, and several authorities are cited in support of this position.

It is not necessary to determine this point, for if the counsel is correct, it would only show that the court of appeals committed an error in rendering the judgment. Such, even if committed, would not discharge the sureties upon the undertaking. They undertook, in case of affirmance of the judgment, or any part of it, to pay the amount directed to be paid by said judgment, and all costs and damages which might be awarded against the appellants upon the appeal. This

bound the sureties to pay the judgment if affirmed, although the court might have erred in point of law in such affirmance. It also bound the sureties to pay the costs and damages awarded by the court, although a similar error might have been committed in awarding the same. It was therefore immaterial as to the liability of the sureties whether the statute in question applied to cases pending at the time of its passage, or to appeals thereafter brought. If the latter be the true construction, the award of five per cent. damages upon the amount of the judgment was unauthorized by law, and the judgment in this respect should have been corrected upon motion.

But it is said by counsel, that at time of the execution and filing of the undertakings by the defendant, there was no law authorizing the court to award as damages anything but interest upon the affirmance of the judgment. This is correct. The counsel from this argues that if the statute authorizing a further allowance is applicable to cases pending at the time of its passage, the liability of the sureties was thereby increased without their assent, and consequently they were thereby discharged. The same argument would apply to an increase of costs upon affirmance, made by statute. The liability of the sureties would in such case be increased, and the like effect would follow from a statutory increase of the rate of interest, and in either event, the sureties would be discharged if the reasoning of the counsel in the present case is sound. I cannot concur in this reasoning. I think the defendants' contract was entered into, subject to the power of the legislature to change the law in these respects, and that they are bound by the contract, construed by the law as it exists at the time they are called upon to perform it. This class of cases has no analogy to those where parties have, by their own acts, changed their contract to the prejudice of a surety of one without his assent. See People *v.* Vilas, 36 *N. Y.* 459. The same reasoning is applicable in this respect to the present case, as was applied by the court in that case. There is no more reason for discharging the sureties in case of a change in the statute authorizing an additional allowance of damages, than there is of a like change imposing additional costs. In neither is the surety discharged.

The counsel cites Stern *v.* Finley, 25 *Miss.* 535. In this

case, during the pendency of the action in which the bond was given, the legislature passed an act making it the duty of the court, in that class of cases, to give judgment for ten per cent. damages in addition to the interest. The court held, that the statute did not apply to pending, but to future cases only, and accordingly held, that the surety was not liable for the ten per cent. damages. In Woodson *v.* Johns, 3 *Munf.* (*Va.*) 230, a similar judgment was given, the court saying that, at the time of the execution of the bond, no such damages were allowed by law. If by this the court designed to be understood that the law was only applicable to future cases, it has no application to the present case, for we have seen that that question cannot be raised in this action, but only by motion to correct the judgment of the court of appeals, and that motion must be made to that court in the original cause, according to the practice in this State. If the court proceeded upon the ground that the statute did apply to the case so far as the party was concerned, and that a judgment against him for the damages would have been legal, but that it could not be applied against the surety, for the reason that it enlarged his liability without his consent, the court should have held the surety entirely exonerated by the change. The obligation of the principal was no longer the same. He would be held upon one contract, and his surety upon another. The liability of the surety would be on the contract, under the law as it was at the time it was entered into, while that of the principal would be more extensive under the law at the time of pronouncing judgment. When the contract is changed by the act of the parties, it is never held that the principal is liable upon the new contract, and the surety upon the old, but the latter is entirely discharged. The judgment appealed from must be affirmed, with costs.

MILLER, J.,—delivered an opinion in which he examined the question whether the amendment cited extended to appeals taken previous to the period when it was adopted, and embraced the undertaking upon which the judgment in this action was obtained, and concluded that it did not, in which he relied on the following authorities: Ely *v.* Holton, 15 *N. Y.* 595; Hamilton *v.* Averill, 11 *Wend.* 622; Bailey *v.* Mayor, &c. of New

York, 7 *Hill*, 146; Bull *v.* Ketchum, 2 *Den.* 188; Beatty *v.* Smith, 2 *Hen. & M.* 397; Burn *v.* Carvalho, 4 *Nev. & M.* 893; Rex *v.* Wise, 2 *Barn. & A.* 204, and note; Langley *v.* Warner, 1 *N. Y.* (1 *Comst.*) 606, 607; Woodson *v.* Johns, 3 *Munf.* (*Va.*) 230; Stern *v.* Finley, 25 *Miss.* 535; Jeter *v.* Laughesne, 5 *Galt*, 210.

The learned judge then examined the question whether the fact of erroneously including these damages in the judgment wholly absolved the sureties from their obligation, concluded that it did not, but that the amount might now be deducted.

A majority of the judges concurred in the opinion of GROVER, J.

Judgment affirmed, with costs.

HOTCHKISS *v.* ARTISANS' BANK.

September, 1866.

Affirming 42 *Barb.* 517.

A package of money addressed to "T., cashier of the A. bank," is duly delivered, so as to discharge the carrier from liability, by delivering it to a clerk or receiving teller while he is acting behind the counter of the bank in discharge of his duties as teller, and who had previously received a similar package which the bank had credited on their books accordingly.

Calvin Hotchkiss and L. B. Hotchkiss sued the Artisans' Bank, in the supreme court, to recover fifteen hundred dollars alleged to have been deposited by plaintiffs with defendants.

The facts are stated in the opinion. Plaintiffs had judgment.

The supreme court, at general term, on appeal from the judgment, held that the bank, by placing Shotwell behind the railing, and permitting him to act there as assistant receiving teller, presented or held him out to the express agent as authorized to receive the package; at least for the purpose of

delivering it to the cashier. Reported in 42 *Barb.* 517. Defendants appealed to this court.

A. Prentice, for defendants, appellants;—That Shotwell was plaintiffs' agent for the purpose of handing the package to defendants' cashier, cited Bank of the State of N. Y. *v.* Farmers' Branch Bank, 36 *Barb.* 332; Mechanics' Bank *v.* N. Y. & N. H. R. R. Co., 13 *N. Y.* 632; Claflin *v.* Farmers' and Citizens' Bank, 25 *Id.* 293; Weissers *v.* Dennison, 10 *Id.* 68.

Barlow & Hyatt, for plaintiffs, respondents;—That Shotwell was authorized to receive the money package, cited Summers *v.* Solomon, 7 *Ellis & B.* 879; Sweet *v.* Barney, 23 *N. Y.* 335; Wood *v.* Auburn & Rochester R. R. Co., 8 *Id.* 160; Prescott *v.* Flynn, 9 *Bing.* 19; Johnson *v.* Jones, 4 *Barb.* 372; Dows *v.* Green, 16 *Id.* 72; S. C., on appeal, 32 *Id.* 490.

HUNT, J.—This is an action to recover the sum of fifteen hundred dollars, claimed to have been sent by the plaintiffs to the defendants, and delivered to them at their banking house, in the city of New York, and which has never been repaid to the plaintiffs. The plantiffs were bankers in the western part of this State, and kept an account with defendants in the city of New York, remitting money or securities, and making drafts from time to time, as their convenience required. On September 28, 1860, the plaintiffs sent by express a package containing fifteen hundred dollars, directed to "R. A. Tooker, cashier of the Artisans' Bank, New York." The package was delivered on the 29th to the assistant receiving teller of the bank, he being at the time behind the counter, and acting in the discharge of his duties as such teller, and who then and there receipted the same on the book of the express company. The same teller had, on September 22, received and given a receipt in the express company's boo for another money package, similarly addressed, and which was credited to the plaintiffs. The package in question never reached the hands of the cashier, and was never credited to the plaintiffs. The cashier was in the bank and in his own room at the time of the delivery of the package to the receiving teller. The referee gave judgment

for the plaintiffs, which was affirmed by the general term of the first district.

The case of Sweet *v.* Barney, 23 *N. Y.* 335, is decisive of the defendant's liability. The delivery of the money package in that case was made to the porter of the People's Bank, at the express office, and not at the bank with which he was connected, and to which the package was addressed. The package was addressed "People's Bank, 173 Canal-street, New York." It was proved that the porter had for many years been in the service of the bank, that he was accustomed to receive money brought by the express company, at the bank, at the clearing house, and at the express office. He was also accustomed to act for the bank, in making exchanges and collections, and acted as its representative at the clearing house, at a desk labeled "People's Bank," and had often received packages of money from the defendants, addressed to the People's Bank and given receipts for the same. The express office was in the same building with the clearing house, and the porter requested the company to keep the packages for the People's Bank till he called for them. They did so, and he regularly called for them and gave receipts for them. Numerous other packages for the People's Bank had been delivered to the porter, within a few days previously, without objection on the part of the bank. The package was stolen from the porter after its delivery to him. It was held that this constituted a complete delivery to the bank.

In the present case, the package was delivered to one invested with the apparent authority to receive it. He stood behind the defendants' counter, acting as their agent, and in the very business of receiving such money as its dealers should desire to pay to or deposit with them. The superscription of the package informed its bearer that it was for and to be delivered to the Artisans' Bank. The name of the cashier involved no more necessity to deliver it to that officer, than if it had been directed, as in case of Barney *v.* Sweet, *supra*, to the bank simply. The bearer delivered it to the acting receiving teller of the bank, to whom he had a few days previously delivered a similar valuable package, and which was duly credited to the plaintiffs. The delivery to the defendants was complete, and as they do not

claim to have repaid the money, they are liable for the amount, with interest.

All the judges concurred.

Judgment affirmed, with costs.

HOTCHKISS *v.* THE CLIFTON AIR CURE.

December, 1868.

If a referee, selling property under a decree, irregularly sells it free from a lien which he promises to pay off out of the proceeds, instead of selling it subject to the lien, as directed by the decree, the purchasers cannot be compelled to pay into the court the amount of the lien, in addition to their bid; but if the terms of sale were prejudicial to any party the remedy is an application for a resale.

Leman B. Hotchkiss brought an action in the supreme court against the Clifton Air Cure, a corporation, and many other defendants, to foreclose a mortgage on real property. A judgment was obtained directing a referee to sell the premises at auction.

The referee made a sale, and reported that he had sold the premises for twenty thousand dollars, and delivered the deed and received the amount of the bid less two thousand five hundred and twenty-six dollars and sixty-three cents. This sum the purchasers refused to pay, claiming that they were entitled to retain it to discharge a prior mortgage on the premises. The Clifton Air Cure, who had owned the equity of redemption, moved the court to compel the purchasers to pay this sum.

The referee made affidavit that he sold the premises for twenty thousand dollars, to the highest bidder. That after the sale was opened, and before the premises were struck off, he was informed that there was a prior mortgage on the premises, and was informed by plaintiff's attorney that the decree authorized him to pay that mortgage out of the proceeds of the sale. That thereupon, without having examined the judgment, he announced to those present that he would pay off the prior mortgage out of the proceeds of the sale. That before he made this

announcement, the purchasers had made their bid of twenty thousand dollars, which was the only bid made. That the only reason why he did not require payment of the whole twenty thousand dollars on delivery of the deed was the representation of plaintiff's attorney, under which he supposed that the purchasers were entitled to retain it to pay off the mortgage, and that he believed that he was by so doing carrying out the judgment.

Several affidavits in opposition to the motion alleged that the first bid was for sixteen thousand five hundred dollars, and that the bid of twenty thousand dollars was not made until after the announcement that the premises would be sold free from the prior mortgage. The weight of the affidavits was decidedly to this effect.

The supreme court, at special term, granted the motion, but on appeal, their order was reversed at general term (neither court assigning their reasons), and the moving parties appealed to this court.

John H. Reynolds, for the appellants.

Wm. H. Adams, attorney for the purchasers, respondents.

HUNT, Ch. J.—It is quite possible that the referee erred in undertaking, upon the sale, to provide for the payment of the prior mortgage. The decree simply directed him to sell the premises, and to distribute the proceeds in the manner therein pointed out. To have confined himself to the duty thus indicated, would have been a performance of which no one could have complained. The plaintiff's attorney, having the carriage of the decree, desired the referee to announce that he would pay off the prior mortgage, and that the purchaser should receive a clear title. Without much reflection, and without an opportunity to examine the decree, the referee made such announcement, and made the sale on these terms. The appellants here, being a portion of the original defendants, say that this was unauthorized by the decree, that it produced an injurious effect upon the price to be obtained, and ask that the purchaser be compelled to pay the amount of the prior incumbrance.

Assuming the law to be as claimed by the appellants, the relief asked for is a *non sequitur*. If the sale was

irregular or unauthorized, it by no means follows that the purchasers should be compelled to pay two thousand five hundred dollars more than they bid for the premises. On the contrary, the plain remedy would be to vacate the sale, and again to offer the premises for sale. This the appellants do not ask, and apparently do not desire. While they insist that the sale was irregular, they also insist upon its confirmation. While they say that the referee had no right to sell upon the promise of giving a clear title, they still insist that the purchasers shall be held to their purchase, and shall pay two thousand five hundred dollars more than they undertook to pay, when they bid on the property. This claim is in violation of every sound principle. The purchasers never made the contract which the appellants seek to impose upon them. They have performed fully the bargain they did make. The appellants have received, and yet enjoy the benefit of it, and nothing further can be required of the purchasers.

I can see no advantage in requiring the purchasers to bring this two thousand five hundred dollars into court for the purpose of distribution. There is no suggestion that the holder of the mortgage desires this to be done, or even that his mortgage is in such a condition that he can be compelled to receive the amount of it. He is not even a party to the action. Whether it be done, or whether the mortgage shall continue as a security and shall be a lien on the premises sold, is of no possible importance to the appellants. It covers the whole premises, is the first, and so far as it appears, the only lien, and all the appellant's rights in the premises are finally and forever foreclosed.

The order of the general term should be affirmed, with costs.

CLERKE, J.—This may be deemed an application seeking the equitable interposition of the court. The application is, that the purchasers should be compelled to complete their purchase. The answer is, that they have already done so. The referee expressly told them, at the time of the sale, that, at the suggestion of the plaintiff's attorney in the foreclosure suit, he would pay off the prior mortgage, and give a clear title. The premises were then sold, under that announcement, for twenty

thousand dollars, and thereupon such an arrangement was made that the referee executed and delivered a deed, and the purchasers paid him twenty thousand dollars, less two thousand five hundred and sixty-two dollars and sixty-three cents, which was the amount of the prior mortgage on the day of sale, and which, unless since paid by the purchasers, is still an incumbrance on the premises. The effect of granting this application would be to compel the purchasers to pay two thousand five hundred and sixty-two dollars and sixty-three cents more than they contracted to pay. This would be inequitable; and the general term were right in refusing to lend its aid to an effort to deprive these purchasers of money which they never undertook to pay.

The order should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs.

HOUGHTON *v.* McAULIFF.

September, 1863.

Under the provisions of 1 *R. S.* 591, respecting moneyed corporations, a transferee of a note for more than one thousand dollars, which was on its face payable to such a corporation, and which was transferred without authority of the board of directors, cannot recover thereon against the makers, without proof that he took it in good faith, and for value.*

Amory Houghton sued Michael McAuliff and John W.

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* Compare Ogden *v.* Raymond, in this series; also, City Bank of New Haven *v.* Perkins, 29 *N. Y.* 454; Wood *v.* Wellington, 30 *Id.* 223; Brookman *v.* Metcalf, 32 *Id.* 591; and see Sanford *v.* Sanford, 45 *N. Y.* 723.

To render void the transfer of a note by an insolvent corporation to a *bona fide* holder for value (under 1 *R. S.* 591, § 9), it is necessary that the transfer should have been made, not only when the institution was insolvent, or contemplated insolvency, but with the intent of giving a preference to a particular *creditor* over other creditors of the company. Marine Bank *v.* Clements, 31 *N. Y.* 33.

Wheelock, in the New York superior court, on a note made by them, dated October 1, 1855, for one thousand dollars, payable to the International Insurance Company or order, and indorsed by Avery, the president, and Rollo, the secretary. It appeared on the trial that the note was valid in the hands of the company; that Avery, who made a large claim against the company, without authority took from their possession and appropriated to his own use this and other securities to an amount exceeding his claim, and refused to give them up; and finally required the executive officers of the company to accept a note from him for the excess, in settlement. This settlement was subsequently discussed in the board of directors, but the board took no action on it. Evidence was given that a broker had purchased this note, and sold it again; but nothing to show how plaintiff acquired it. Plaintiff was nonsuited.

John H. Reynolds, for plaintiff, appellant.

Gilbert Dean, for defendants, respondents.

By the Court.—Davies, J.—The note in controversy bears evidence upon its face that, at the time of its negotiation, it was the property of the insurance company. It contained the promise of the defendants to pay to the International Insurance Company, or order, the sum of one thousand dollars. This insurance company was made subject to the provisions of the statute relative to moneyed corporations. 1 *R. S.* p. 598, § 51; *L.* 1844, p. 229, and 1855, p. 505; Mutual Insurance Company of Buffalo *v.* Supervisors of Erie, 4 *N. Y.* 442; Brouwer *v.* Harbeck, 9 *N. Y.* 589. By section 8, article 1, of the act relative to the insolvency of moneyed corporations (1 *R. S.* 591), it is declared that no assignment or transfer of any of the effects of such corporation exceeding in value the sum of one thousand dollars, shall be made, which was not authorized by a previous resolution of its board of directors; and section 10 declares that any director who shall violate, or be concerned in violating, any provision of the preceding section, shall be liable personally for any loss the corporation may sustain from such violation; and section 11 declares, that every director guilty of violation, whether a loss shall or shall not result, shall be

guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. The note in suit, with others to a large amount, was never at any time assigned or transferred by the authority of the board of directors. They were taken by Avery, a director, under such circumstances as made such taking on his part a criminal offense. There was never any previous resolution of the board authorizing the taking of them by him, and he was therefore subject to the penalties prescribed by the statute for such unlawful taking. It seems hardly necessary to add that such illegal taking conferred no title upon him to the notes so taken and received by him. Gillett *v.* Phillips, 13 *N. Y.* 116. Having no title to the note in controversy, he could confer none upon any person taking the note from him, and it would, consequently, be void in the hands of all persons receiving it, unless they brought themselves within the exception of the last clause of section 8. This exception is, that the provisions of that section shall not be construed to render void the assignment or transfer in the hands of a purchaser for a valuable consideration and without notice. *Prima facie*, the note being the property of the company, and having been transferred or assigned unlawfully, it is void in the hands of the assignee or holder. If he wishes to relieve himself from the illegality which the statute has impressed upon the transaction, he must bring himself within the exception contained in it, by showing that he is a *bona fide* purchaser of this particular piece of property of the company In other words, he must show that he purchased it for a valuable consideration, and without notice of the facts, which the statute declares renders the transfer void and illegal.

The plaintiff in this action has not done this, nor made any attempt to do it. He does not adduce any state of facts or circumstances which show, or tend to show, that he stands in any better position than Avery himself in reference to this note. He cannot, therefore, maintain an action upon it.

The nonsuit was correctly granted, and the judgment thereon should be affirmed, with costs.

All the judges concurred, except EMOTT, J., not voting.

Judgment affirmed, with costs.

HOWELL *v.* CITY OF BUFFALO.

December, 1863.

Where lands have been sold for the non-payment of an illegal assessment, an action to enjoin the delivery of a final declaration of sale or conveyance, and to have the assessment and sale canceled, does not lie, if, under the statute authorizing such sales, the declaration or conveyance must disclose the illegality in the assessment.

A court of equity does not assume jurisdiction on the ground of preventing a multiplicity of actions, where the cause of action is a single illegal assessment affecting numerous owners of distinct parcels of land whose interests are several, not joint. They cannot unite in one action merely to avoid the necessity of separate actions.*

Stephen W. Howell commenced this action in February, 1862, in the superior court of Buffalo, on behalf of himself and such others as should come in, &c. The complaint alleged that Howell was owner of land on Niagara-street; that a petition had been presented to the common council by petitioners averring themselves liable to be assessed therefor, asking to have the street graded and paved, and crosswalks across the same, and sluices, sewers, and receivers, &c., constructed; that annexed to the petition was the following certificate of the city assessors:

"Certificate of assessors.

"Proposed improvement for grading and paving Niagara-street, from the north line of Auburn-avenue to the northerly line of Amherst-street, and all the necessary crosswalks across the same, sluices, sewers and receivers, curbing and platform stones, &c.

"To the common council of the city of Buffalo:

"We, the undersigned, city assessors of the city of Buffalo, do hereby certify that the application for the above improvement is made by a majority of the property holders residents of the said city, and directly interested therein, and liable to be taxed or assessed to pay for the same, except such additional

* S. P. Thurston *v.* City of Elmira, 10 *Abb. Pr. N. S.* 110. As to remedy by certiorari, compare People *ex rel.* Haskin *v.* Supervisors, 8 *Abb. Pr. N. S.* 277; S. C., 37 *Barb.* 378.

territory as may be embraced in an assessment for the improvement of the park, between Parish and South-streets."

The complaint alleged that no other petition or certificate was ever presented or filed; that the common council, by resolution, directed grading, paving, curbing, crosswalks, sewers and receivers, and the placing of platform stones to be done, and the expense assessed; that the assessors laid an assessment therefor, and after a hearing of objections the common council confirmed it; that the comptroller sold the lots of the plaintiff Howell, for non-payment of the sums assessed thereon, to the city, and delivered to the city certificates of sale pursuant to the charter. The form or contents of the certificates were not stated, nor were the names of the petitioners, nor were those of all the persons assessed, except the allegation that all the plaintiffs were assessed.

The complaint then alleged that the assessment and sales were illegal and void; and they, with the certificates, constituted a cloud on plaintiff's title; that plaintiff had reason to fear that at the expiration of nine months from sale defendant would give him notice to redeem, and in default of redemption would grant a declaration of sale to the city under the amended charter.

Then followed (in the amended complaint) allegations by forty-six other plaintiffs who had been brought in by an order founded on their petition, and who alleged that their lots, set forth in a schedule, had been sold in the same way; and that their position in reference to the assessment was identical with that of Howell.

The relief demanded was judgment declaring the assessment illegal and void, directing the city to deliver up and cancel the comptroller's certificates of sale, and enjoining the common council from granting a declaration of sale.

Defendants demurred to the jurisdiction of the subject, and to the sufficiency of the facts to constitute a cause of action.

The superior court overruled the demurrer, and held, on the authority of Lathrop *v.* City of Buffalo,* that the certificate must, on its face, state that the application was made by a

*Reported at p. 30 of vol. 3 of this series.

majority of the property holders resident in the city, and liable to be assessed for the improvement, for which a petition and certificate are necessary. From a judgment for plaintiff, defendants appealed.

H. S. Cutting, for defendants, appellants.—The assessors' certificate gave jurisdiction, for, 1. This was one entire work. 2. It is not alleged in the complaint that the petition was not signed by a majority of those assessable for each class of work. 3. It was not alleged but that the assessment was so distributed that a majority of those affected by that which related to work requiring a petition were petitioners. In Lathrop's case the names of the petitioners and the assessed were in evidence. 4. It does not appear but that all the land owners in the district were assessed in equal proportions. 5. It may be presumed that the petition was signed by the necessary majority. 6. The certificate was in the language of the statute. The last clause, relating to additional land, does not vitiate, for it only states that the majority does not embrace the owners of land liable to assessment for the park, &c., under *L.* 1856, p. 148. If the assessment were unauthorized, the facts do not entitle plaintiffs to equitable relief, neither to prevent multiplicity of suits (Brown *v.* City of Brooklyn, 15 *Barb.* 375). nor to prevent irreparable, injury to the freehold. Mayor, &c. of Brooklyn *v.* Meserole, 26 *Wend.* 132; Heywood *v.* City of Buffalo, 14 *N. Y.* 534; Baldwin *v.* Same, 29 *Barb.* 396. Nor on the ground of cloud on title. No extrinsic facts are shown. The provision for issuing a declaration of sale to be presumptive evidence that the assessment was properly made, cannot help plaintiffs' case; for such a declaration has not been, and may never be, issued. Scott *v.* Onderdonk, 14 *N. Y.* 9, is therefore distinguishable, and this case is brought within Heywood *v.* City of Buffalo *supra*.

A. P. Nichols, for plaintiffs, respondents;—Relied on Lathrop *v.* City of Buffalo, as holding the certificate of assessors insufficient, and Scott *v.* Onderdonk, as authority for maintaining the action, on the ground, among others, of the legal virtue imputed by statute to the certificate of the comptroller on sale of lots for non-payment of tax, &c., as evidence.

BY THE COURT.—MARVIN, J.—[After stating the facts, and disposing of another question.]

There is, however, another question in the case: Can the plaintiffs maintain this action? Were they entitled to the remedy resorted to, and the judgment given? The want of jurisdiction is patent in this case. It appears upon the face of the papers upon which the common council acted and assumed jurisdiction.

The remedy by a common law *certiorari* is ample in this case for each of the plaintiffs; and when this remedy clearly exists, a court of equity will not entertain jurisdiction. Mayor of Brooklyn *v.* Messerole, 26 *Wend.* 132, decided by the court for the correction of errors, is a leading case in point. It was held in that case that when the proceedings in a street case were illegal, so as confessedly to render them inoperative and void, it was not a proper case for equity jurisdiction and relief; that a common law *certiorari* was undoubtedly the proper remedy. In Heywood *v.* City of Buffalo, 14 *N. Y.* (4 *Kern.*) 534, it was held that the assessment was illegal, and the proper remedy was by *certiorari;* and that as a general rule, a court of equity would not entertain an action for relief against such assessments; that such action, however, would lie when it is necessary to prevent multiplicity of suits, or irreparable injury, or when the assessment on the face of the proceedings to impose it is a valid lien on land, and extrinsic evidence is requisite to show its invalidity. In Baldwin *v.* City of Buffalo, 29 *Barb.* 396, the proceedings upon their face were perfect, and the lien on the land apparently valid, and plaintiff averred an extrinsic fact to show the invalidity of the lien. The present is not such a case, nor does it come within the rule touching irreparable injury, nor have the proceedings created such a cloud upon title of the lands of the plaintiffs as will justify a court of equity in interfering. The proceedings of the common council were void, and it clearly appears upon the face of the papers necessary to show the proceedings. If this action can be sustained, it must be upon the ground that the proceedings of the common council will necessarily lead to a multiplicity of actions.

It should, perhaps, be stated that the action was commenced

by Howell alone, and I infer that the demurrer was interposed while Howell was sole plaintiff. The other plaintiffs, some forty-five in number, were made plaintiffs upon their application to the court, by an order, dated November 24, 1862, and directing that the complaint be amended as of June 2, 1862. These plaintiffs own lands in severalty, which have been assessed and sold. They have no common or joint interest in any one parcel of the lands. In my opinion, they could not unite in this action; and the rules relating to bills of peace, and to the prevention of a multiplicity of actions, have no application to such a case. No case has been or can be, as I think, cited in support of this action by all of these plaintiffs. Each plaintiff had a cause of action to reverse, on a common law *certiorari*, the proceedings of the common council taken against him or his property. But the plaintiffs had no common interest in anything to be affected by these proceedings.

As to parties to actions in equity, the general rule is, that all persons materially interested, legally or beneficially, in the subject matter of the suit, are to be made parties, plaintiff or defendant. *Story Eq. Pl.* 74; *Code*, §§ 117, 119. The plaintiffs have an interest in the subject of the action, and in obtaining the relief demanded, and those who are united in interest must be united as plaintiffs or defendants.

The subject matter in this case is land, and every plaintiff must be interested in the same piece of land. The complaint in this case is multifarious. There is an improper joinder of plaintiffs who claim no common interest, but assert distinct and several claims against one and the same defendant. This is not allowable. *Story Eq. Pl.* 230.

It is not a case for the application of the rule for the prevention of a multiplicity of suits. No one of the plaintiffs is threatened with many suits or much litigation. Probably a single suit would settle all his rights, though he should not now resort to his remedy for the reversal of the proceedings. In short, there is no authority for maintaining this suit by the plaintiffs united, or by one of them separately, as to his land. *Story Eq. Pl.* §§ 64, 66, *et seq.*; 492, *et seq.*; 514. *et seq.*; 679; *Cooper Eq. Pl.* 153, 157; 2 *Atk.* 483; West *v.* Mayor, &c, of N. Y., 10 *Paige*, 539. In Bouton *v.* City of Brooklyn,

15 *Barb.* 375, 387, a case like the present, except that there was but one plaintiff, Justice STRONG has discussed quite fully the rule of equity jurisdiction to prevent a multiplicity of suits, and holds that it had no application to cases like the present. The case was appealed to the general term, which affirmed the judgment upon the opinion of BROWN, J., which is an elaborate and learned examination of the jurisdiction of the court, first, in preventing a multiplicity of suits; and second, in removing a cloud from the land of the plaintiff. I shall not consider these questions further. As to parties, and who may be united, I have referred to the Code as containing the rules substantially adopted by courts of equity, and I may add that an improper union of several causes of action is a ground of demurrer (§ 144, subd. 5,) though a misjoinder of parties is not. The complaint may be good as to one of the plaintiffs, and not as to another but it will not be good as to one if it contains several causes improperly united.

The question of jurisdiction and relief by injunction, would have been in the case of Lathrop *v.* City of Buffalo, but for a provision of the act of 1853 to revise, &c., the charter of Buffalo, authorizing the action, when it should be made to appear that the proceedings upon a local assessment were illegal, and making it the duty of the court to restrain any further action and the collection of the assessment. *L.* 1858, p. 645, § 8.

This provision was repealed in 1861 (*L.* 1861, p. 630,) before this action was commenced.

The judgment must be reversed, and there must be judgment for the defendant upon the demurrer.

DAVIES, J., delivered an opinion to the effect that the judgment appealed from was correct, on the merits of the assessment and sale, but that the complaint should have been dismissed, on the ground that the proceeding was void on its face, and hence a case of equitable jurisdiction was not made out.

All the judges concurred in reversal, except H. R. SELDEN, J., not voting.

Judgment reversed, and judgment given for defendants, with costs.*

HOWELL *v.* GOULD.

June, 1867.

If the employer in a building contract refuses to perform on his part, and actually prevents performance by the contractor, it is unnecessary to

* This decision, not having been before reported, has been supposed by some to have been inconsistent with Scott *v.* Onderdonk, and was somewhat questioned in Allen *v.* City of Buffalo, 39 *N. Y.* 386; 38 *Id.* 280; and Hatch *v.* City of Buffalo, *Id.* 276. But Scott *v.* Onderdonk was not disregarded, as appears above, and the decision went upon the ground that under the language of the statute (§ 18, see vol. 3, p. 32), which required that the declaration, the issuing of which plaintiffs sought to restrain, must recite the "fact of assessment," such a declaration must contain, by way of recital or otherwise, the substance of the certificate or report of the assessors; and that it would not be a compliance with the language of the act to say that the land was assessed, advertised and sold, without saying for what it was assessed; that when it stated for what, then the defect in the proceedings would be patent upon the face of the declaration; and hence the remedy was by certiorari, not by action.

See also Tilden *v.* Mayor, &c., 56 *Barb.* 340; Farnham *v.* Campbell, 34 *N. Y.* 480; Fonda *v.* Sage, 48 *Id.* 173; Crooke *v.* Andrews, 40 *Id.* 574; Newell *v.* Wheeler, 48 *Id.* 486.

The cases of Efner and of Vandeventer *v.* City of Buffalo, came before this court at the same time as the above.

EFNER *v.* CITY OF BUFFALO, was an action brought in 1859, while the provision of section 8, c. 372, of *L.* 1858, was in force, allowing any party aggrieved by an illegal assessment in Buffalo to apply to any court of competent jurisdiction to restrain further proceedings. This statute was repealed April 16, 1861 (*L.* 1861, p. 630, § 31, c. 272), before the action of Howell was brought.

Efner's case involved the validity of the same assessment as Howell's case. It was tried at special term, judgment given for plaintiff setting aside the sale, and the judgment was affirmed at general term at the same time and on the same grounds as the decision in Howell's case, and the appeal was submitted in this court by the same counsel.

This court reversed the judgment, on the ground that the assessment being invalid on its face, it was not a case for equitable jurisdiction.

Judgment reversed, and complaint dismissed, with costs.

VANDEVENTER *v.* CITY OF BUFFALO, was an action by Sally B. Vandeventer, brought in May, 1862, to set aside a sale for an unpaid assess-

prove readiness and ability on the part of the latter to perform in order to recover against the former.*

Evidence of the insolvency of the contractor is immaterial.

Nelson Howell sued David H. Gould, in the New York common pleas (whence the action was transferred to the supreme court), for damages for the breach of a building contract. The contract was made by Gould with one Treadwell, and the cause of action was assigned by him to plaintiff.

The plaintiff, in his complaint, alleged that his assignor entered into a contract with the defendant for the purchase of six lots in the city of Brooklyn, and for the erection of buildings thereon, the defendant agreeing to make advances therefor, and to take a mortgage in payment; that, pursuant to such agreement, he entered upon the lots, commenced the erection of the buildings, furnished materials for the same, and partly completed them, when the defendant refused to make advances or to carry out the contract, as he had agreed; refused to per-

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ment. The complaint was substantially in the same form as in the case of Howell, above, except that the assessment was for grading, &c., Main-street, the assessors' certificate being as follows:

"PROPOSED IMPROVEMENT.

"For grading, curbing and paving Main-street, from the north line of North-street, to a point 165 feet north from the north line of Ferry-street.

"To the common council of the city of Buffalo.

"We, the undersigned, city assessors of the city of Buffalo, do hereby certify that the application for the above improvement is made by a majority of the property holders residents of the said city, and directly interested therein, and liable to be taxed or assessed to pay for the same."

Defendants demurred in the same form as in Howell's case. The superior court of Buffalo held that *in this* case the certificate of the assessors was in compliance with the law; that the curbing was part of the paving; and that the certificate sufficiently showed that the application was made by a majority of those liable to be assessed for the grading and paving. The court accordingly gave judgment for defendants, and plaintiff appealed.

The cause was submitted in this court by the same counsel.

This court affirmed the judgment, with costs.

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* It is otherwise of contracts of employment relating to personal services. Moody *v.* Leverich, 14 *Abb. Pr. N. S.*

mit further performance, and dispossessed the contractor of the premises and property. The plaintiff averred as the damages, the loss in the value of the lots over the agreed price, in the value of the buildings over their cost, and in the cost of labor and materials expended on them.

The defendant admitted the contract, averring that it was in writing, and alleged breaches on the part of the contractor, and forfeiture by reason of non-performance, and also averred payment to the extent of all claims thereunder; and asked, as affirmative relief, that the agreement be annulled and adjudged cancelled.

The contract contained a clause of forfeiture of all rights under it, either for a conveyance or for the value of work and materials, in various contingencies, among which were the builder's failure to perform any provision of the contract, in substance or in point of time. It also required an architect's certificate, as a condition precedent to payment.

The main question in the case was, whether, under the contract and the other evidence, the plaintiff could recover in the absence of complete performance, or proof of readiness and ability to perform.

On the trial, the parties gave evidence in support of their claims respectively, as set forth in the pleadings. The jury found in favor of the plaintiff, and assessed his damages at four thousand two hundred and seventy-seven dollars and thirty-six cents.

The supreme court, on appeal, affirmed the judgment, upon the same grounds as those assigned by this court. The portions of the opinion (delivered by LOTT, J.) which relate to the question of evidence, were as follows:

The plaintiff was asked whether he was solvent August 1, 1860, and solvent on September 1, and October 1, 1860. This question was overruled, and, as we think, properly. An answer by him in the negative would not have been sufficient to show his inability to perform the contract; but if it was pertinent to that end, the act of the defendant in stopping the plaintiff from going on with the work, made, as before stated, the question of such inability immaterial.

Witnesses were also permitted to answer, under exceptions by the defendant, what effect his delay in making payments had on the progress of the work towards completion.

Assuming that the question was improper, it is no ground for a new trial. Such delay on the part of the defendant, being established, tended to excuse that of the plaintiff in the performance of his work, irrespective of its actual effect on the progress of it.

The consequence of such delay was, therefore, immaterial, and produced no injury to the defendant. It is suggested by the counsel of the defendant, that the defendant's delay is unavailing to the plaintiff, because no proof was given that it occurred after a proper certificate had been obtained from Martense, the architect. That ground was not taken when the objection was made, and cannot be urged now.

These views lead us to the conclusion that none of the exceptions were well taken, and that the motion for a new trial was properly denied. The order denying that motion, and the judgment, must, therefore, be affirmed, with costs.

The defendant appealed to this court.

J. L. Jernegan, for defendant, appellant;—Cited, Butler *v.* Tucker, 24 *Wend.* 447; Martin *v.* Leggett, 4 *E. D. Smith*, 255; Smith *v.* Brady, 17 *N. Y.* 173; Hasbrouck *v.* Tappen, 15 *Johns.* 200, 204; Delacroix *v.* Bulkley, 13 *Wend.* 71; Eddy *v.* Graves, 23 *Id.* 82; Boscawin *v.* Bliss, 4 *Taunt.* 735; Palmer *v.* Lorillard, 16 *Johns.* 348; reversing 15 *Id.* 14; Beekman *v.* Frost, 18 *Id.* 544, 558; reversing 1 *Johns. Ch.* 288; Newcomb *v.* Clark, 1 *Den.* 226; Sanford *v.* Granger, 12 *Barb.* 392, 403; *Code*, § 264; Rich *v.* Penfield, 1 *Wend.* 380; Lawrence *v.* Barker, 5 *Id.* 301; Pratt *v.* Hull, 13 *Johns.* 334; Stuart *v.* Simpson, 1 *Wend.* 376.

L. A. Fuller, for plaintiff, respondent;—Cited, Moses *v.* Bierling, 31 *N. Y.* 464; Gould *v.* Gager, 18 *Abb. Pr.* 32; 7 *Cow.* 50; 3 *Johns.* 528; 12 *Barb.* 366; 20 *Id.* 64, 509; 515; 6 *Duer* 203; 1 *Barb.* 338; 6 *N. Y.* (2 *Seld.*) 204, 207; *Civil Code*, 1865, *by Field, Noyes & B.* §§ 843, 1592; 7 *Bing.* 266; 4 *N. Y.* (4 *Const.*) 338; 7 *Hill*, 61; 26 *N. Y.* 279; 28 *Id.* 156; 31 *Id.* 403; American Notes to Seton *v.* Slade, 3 *White & T. Lead.*

Cas. in Eq. 74, 84; Howard v. Harris, in *Same*, [illegible], [illegible].

BOCKES, J. [After stating the facts above.]—The evidence was conflicting. According to the testimony of the plaintiff's witnesses, the contractor performed his agreement so far as he was permitted by the defendant, except, perhaps, in some unimportant particulars, as to which there was evidence of waiver by the latter. According to the proof adduced by the defendant, the contractor was in fault from the first, having omitted performance in almost every particular required of him by the terms of the agreement. Under this conflict of evidence, the case was a proper one for the determination of the jury: and with their verdict the parties must be content, in the absence of any erroneous instruction or ruling by the court bearing on the question of fact which it was their duty to decide.

The case fails to disclose any error in the charge of the judge to the jury. No exception was taken to the charge, nor was any instruction asked for which was not given.

At the commencement of the trial the defendant moved the court for a dismissal of the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The motion was properly denied. The complaint set forth a valid agreement, and both non-performance and refusal to perform, by the defendant, was averred, with consequent damages. If not sufficiently specific in any particular, the remedy of the defendant was by special motion, before answer, under section 160 of the Code of Procedure.

When the plaintiff rested, the defendant, by his counsel, again moved for a dismissal of the complaint, on the ground that the plaintiff had not alleged or shown ability to perform the contract on the part of the contractor. This motion was also properly denied. As the case then stood on the evidence, the jury would have been authorized to find that the contractor had performed, on his part, except in so far as he was excused or was prevented from performing by the defendant.

Again: at the close of the case the defendant moved to dismiss the complaint, because it did not appear that the plaintiff (the contractor) was able, ready and willing to perform the

contract on his part, and that it did not appear from the evidence that he wholly neglected or refused, and was unable so to do, prior to the said alleged breach by the defendant.

To have granted this motion would have been manifest error. As the case then stood on the evidence, the grounds of dismissal involved questions of fact, not in the province of the court to determine. If, as the evidence on the part of the plaintiff tended to prove, the defendant refused to perform on his part, and actually prevented performance by the contractor, it was unnecessary for the latter to show readiness and willingness to perform on his part. It was enough that the defendant himself prevented further performance; and, as regards the latter ground stated, it was certainly a question for the jury, on the whole evidence, whether the contractor had neglected or refused performance on his part.

There was no error in the refusal by the court to dismiss the complaint.

Exceptions were taken to the rulings of the learned judge, as to the admissibility of evidence. But, the consideration of those questions, and the conclusion arrived at in the supreme court, as given in the opinion of Judge LOTT, are quite satisfactory.

The judgment should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs.

HOWELL *v.* HUYCK.

December, 1867.

Where, from the nature of the action, the defendant has notice that the plaintiff intends to charge him with the possession of a certain written instrument, or where the pleadings give notice to the opposite party to be prepared to produce a particular instrument, if necessary to contradict the evidence of the other party, no further notice to produce need be given, before secondary evidence may be received.

A notice to produce papers for any purpose is sufficient to admit parol proof of any fact which their production would show,—*e. g.*, payment indorsed.

Howell v. Huyck.

Declarations made for the purpose of qualifying the possession of property at the time of its sale, are admissible in evidence.

Edmund W. Howell sued William Huyck, in the supreme court, to foreclose a mortgage executed by Charles B. Howell, a brother of the plaintiff, upon lands, now owned by defendant in fee by virtue of deeds of full warranty derived from Charles B. Howell.

The complaint alleged the execution and delivery of the bond and mortgage to Reuben A. Grunendike; his assignment of the same to Bangs, Jameson and the mortgagor Charles B. Howell, on August 20, 1856, and its transfer for value by the latter to the plaintiff, on July 27, 1859.

The answer of the defendant Huyck alleged the payment of the mortgage to Bangs and others while they held it.

The referee before whom the case was tried, found that the mortgage was paid and canceled, and awarded judgment for defendant, Huyck. On the trial, no bond was introduced, and the original mortgage was not produced, but a certified copy from the record only was given in evidence by the plaintiff.

The defendant called for the production of the bond and mortgage, which the plaintiff refused on the ground of want of notice. The referee held that the pleadings were sufficient notice.

The defendants then gave evidence that in October, 1857, Charles B. Howell, the mortgagor, had the mortgage in his possession, and, while negotiating the sale of the land now owned by defendant, stated that the mortgage was paid, and exhibited the indorsements of payments thereon.

Judgment was rendered in favor of defendant.

The supreme court, at a general term, May, 1862 (present, MARVIN, P. J., DAVIS, GROVER and HOYT, JJ.), affirmed the judgment, the following opinion being rendered.

BY THE COURT. [After stating the facts.]—Two points are made on this appeal by the defendant's counsel, the first of which is, that the referee erred in *admitting secondary evidence of the indorsements upon the mortgage.*

The complaint alleged that plaintiff was owner and holder of the bond and mortgage under the assignment from Bangs and others to him. The answer, as I understand it, admitted the execution of the bond and mortgage, but put in issue the assignment to plaintiff, and alleged payment and satisfaction of the mortgage and cancellation of the bond. It was not necessary for the plaintiff to produce the original bond and mortgage on the trial in order to establish his case. Their execution had been admitted; and it is insisted that for this reason if it was important for the defendant to show the indorsements made on them, he should have given notice to produce them. The general rule is that a party shall have previous notice to produce a written instrument in his possession before secondary evidence can be given; and I understand it also to be a general rule that where the pleadings themselves operate as a notice, no further notice need be given.

Within the latter rule are all cases where from the nature of the action the defendant has notice that the plaintiff intends to charge him with the possession of the instrument, or where the pleadings "give notice to the opposite party to be prepared to produce a particular instrument if necessary to contradict the evidence of the other party." Hardin *v.* Kretsinger, 17 *Johns.* 293; People *v.* Holbrook, 13 *Johns.* 90; *Phil. on Ev.* 441; Hammond *v.* Hopping, 13 *Wend.* 505, 508.

In this case the learned referee held that the pleadings were sufficient notice to the plaintiff to produce the bond and mortgage. The bond and mortgage were the subject of the action, and the plaintiff had averred himself to be their "owner and holder." The defendant had alleged *payment* and *cancellation*. It is obvious from this answer that it would be important to produce the particular instrument in order to contradict the evidence of cancellation, which production by plaintiff would be a strong circumstance to corroborate the testimony tending to disprove payment; and hence for that purpose, it seems to me the pleadings were notice to produce the papers. This was not notice, it may be said, to produce them for the purpose of showing indorsement upon them; but a notice to produce them for any purpose, it seems to me, ought to be held sufficient to admit parol proof of any fact which the production of the paper would

show. In this case the production of the mortgage would necessarily show the fact that indorsements of payments appeared upon it; and this was the extent to which the parol evidence of the witness went.

Besides, if the pleadings gave notice to produce in order to meet evidence of cancellation, they may, perhaps, properly be said to give notice in order to rebut evidence of indorsements, because the latter fact is admissible to give character to the cancellation, as tending to show it not to have been accidental but intentional, and properly made after payment of the amount secured. But if the referee was not right in his ruling, I am of opinion the notice given on the trial was in itself a sufficient notice to allow parol proof.

The plaintiff had secured his ownership and possession. The papers being the subject of the action, were presumed not only to be in possession of plaintiff, but also to be present in court. This latter fact may be presumed from the nature of the paper and its particular connection with the cause. *Cow. & H. Notes*, 1186.

In Hammond *v.* Hopping, 13 *Wend.* 505, the suit was on a note. The defense set up was usury, and the plaintiff was fully apprised that the defense would be insisted upon, and it was held that a note given for the extra interest contemporaneously with the one sued on, might, from its connection with the cause and the nature of the instrument, be fairly presumed to be in possession of the party or his counsel in court, and therefore, that notice to produce given pending the trial was sufficient. 13 *Wend.* 505. A far less violent presumption would be required in this case. The plaintiff did not rebut the presumption by his oath, or the oath of his counsel, as he might have done; but put himself on the ground that notice had not been *previously* given. I think, therefore, the decision admitting the evidence, was correct, even if the reason given by the referee should be thought to have been answered.

The second point of the appellant is that the referee erred in *admitting the declarations* of Charles B. Howell. It is quite clear that these declarations were not competent for the purpose of proving payments, and the case shows that they were rejected for any such purpose. The referee on the trial of this

cause was sitting as a court only. It was an equity case, and not within the rules applicable to trial by jury. As such court he received evidence for a definite and specific purpose, and rejected it for any other purpose.

In order to find error in his ruling, it will not do to hold that he received and used the evidence for a purpose for which he declared it to be incompetent. This would be to stultify the court and its rulings.

But it is insisted, that the purpose for which the evidence was received "was a matter of no consequence in the case. There was no relevancy in such an inquiry, and the evidence was wholly immaterial." Grant this to be so, and it follows that no error can be predicated upon its reception,—for it is clear that evidence wholly *irrelevant* and *immaterial*, and upon a matter of no *consequence* in the case, cannot be legally or logically shown to have had any effect on the real issues of the case,—especially when it is manifest by a distinct ruling, that the referee expressly confined such evidence to the inconsequential matter.

But I am by no means clear that the declarations of Howell were not admissible for the purpose to which the learned referee limited them, to wit: "for the purpose of qualifying the possession of the mortgage by him." Howell occupied a double and peculiar relation to this mortgage. He was the mortgagor (having executed the mortgage to Grunendike), and the owner of the mortgaged premises. He was also one of the assignees of Grunendike, holding his assets in trust for creditors. At the time of selling the mortgaged premises, he produced the mortgage and exhibited it and the indorsements upon it, to his vendee, accompanying the act by the declaration that the mortgage had been paid and satisfied. His possession of the mortgage was consistent with either of the two relations to it—the one, that he was holding it as a trustee for Grunendike's creditors under the assignment, the other, as mortgagee after payment and satisfaction. Under such circumstances, for the purpose of qualifying his possession, the declaration accompanying the exhibition of the papers was part of the *res gestæ*, and it seems to me might well be given to rebut the presumption that he held the papers as assignee in trust. *Cow. & H.*

Notes, 589, § 452, and cases there cited. The same rule prevails as to the admissibility of declarations to qualify the possession of personal as of real property. *Cow. & H. Notes*, 601. If it were essential, therefore, to qualify Howell's possession of the mortgage, it was competent to do so by his declaration accompanying the exhibition of the mortgage to his vendee, because that declaration was part of the act itself; and for that purpose only was the evidence received. But if it was not at all material to qualify Howell's possession, then the judgment should not be disturbed. Decrees in equity were never reversed because the court had received incompetent evidence on an immaterial question.

This case seems to have been correctly disposed of on the merits, and I think the judgment may properly be affirmed.

The plaintiff appealed to this court.

George G. Munger, for plaintiff, appellant.

R. Ballard, for defendant, respondent.

DAVIES, Ch. J.—We see no error in the rulings of the referee, either as to the sufficiency of the notice, or in the admission of declarations, and there is, therefore, no ground for reversal.

Judgment should be affirmed, with costs.

WRIGHT, J., also delivered an opinion for affirmance.

All the judges concurred, except FULLERTON, J., who dissented on both points, and PORTER, J., who did not vote.

HURLBERT *v.* DEAN.

December, 1865.

The objection that the judgment debtors are not joined as defendants in a creditor's action to set aside their assignment, is waived if not taken by demurrer or answer.

A referee's report should be inserted in a case immediately after the testimony, and preceding the exceptions thereto; but an inadvertent misplacement of it may be disregarded.

Hurlbert *v.* Dean.

An assignment of partnership assets preferring individual debtors of the several partners, violates the statute in respect to fraudulent conveyances, and shows such a fraudulent intent on the part of the assignors as to render the assignment void.*

The absence of evidence that there were such debts is insufficient to overcome the presumption of fraud in such an assignment.

William W. Hurlbert and others sued Delos W. Dean and Harvey Strong, in the supreme court, to set aside an assignment made to the defendants by James F. Dean and Enos S. Brown, of their real and personal estate.

In March, 1855, James F. Dean and Enos S. Brown, copartners in trade and business, at Oneonta, Otsego county, under the firm name of Dean & Brown, made a verbal agreement with Horatio G. Strong, whereby he was to become copartner with them upon paying one-third the value of their goods and assets, valued at nine thousand four hundred and sixty-one dollars and fifteen cents. Afterward, Strong and Dean purchased goods on credit from the plaintiffs herein, in the name of Dean, Brown & Strong, Thereafter, Strong being unable to pay for his share of the copartnership effects, the firm of Dean, Brown & Strong ceased to exist.

In October of the same year, Dean & Brown agreed to sell out the business to Stephen S. Westcott and Horatio G. Strong, upon certain conditions, which were not fulfilled by Dean & Brown, and the agreement was not consummated.

On November 5, 1855, James F. Dean and Enos S. Brown assigned to the defendants all their real and personal estate, in trust for payment of debts, giving preferences.

Among the trusts in the deed of assignment is the following: Out of the net proceeds of the trust property, the assignees are directed, "first to pay and discharge in full all notes, debts and bills of exchange made by the firm of Dean & Brown, or by the firm of Dean, Brown & Strong, or by any or either of the individuals of the said firms, which notes, debts, or bills, have been indorsed by Delos W. Brown and Harvey Strong, or by either of them, so that the said indorsers shall be fully discharged from all liability as indorsers or surety. Also all notes

* See Turner *v.* Jaycox, 40 *N. Y.* 470.

and drafts, if any, that have been signed by said Delos W. Dean and Harvey Strong."

The plaintiffs were judgment creditors, with three executions returned unsatisfied: two of the judgments being against the firm of Dean, Brown & Strong, and the other against Dean & Brown. The complaint prayed that the deed of assignment might be adjudged fraudulent and void, and that the plaintiffs might be paid their several judgments out of the assigned property, &c.

The referee who heard the cause found that the assignment was made in good faith, and without any intent to hinder and delay creditors; and reported in favor of the defendants, that the complaint be dismissed, with costs to defendants.

The supreme court, at general term, on appeal, were of opinion that the assignors were necessary parties (citing 20 *Barb.* 37; 6 *N. Y.* [2 *Seld.*] 190; 4 *Paige*, 309); but that an amendment would not help the plaintiffs, because the assignment devoted all their property, both individual and partnership, and only the clause giving preference, not the whole assignment, was void, and the debts that were nominally individual were shown by the evidence to be in reality firm debts. They accordingly affirmed the judgment, and plaintiffs appealed.

Abraham Becker, attorney for plaintiffs, appellants.

J. E. Dewey, for defendants, respondents.

DAVIES, J.—It is now insisted on by the respondents that the plaintiffs are not entitled to the relief claimed by their complaint, for the reason that there is a defect of parties defendant. The action is brought by the plaintiffs, as judgment creditors of James F. Dean and Enos S. Brown, upon the return of an execution unsatisfied, to set aside an assignment made by the judgment debtors to the defendants, Delos W. Dean and Harvey Strong. It is claimed that the judgment debtors should have been made parties defendants. This objection should have been taken by demurrer or answer, and if not so taken, the court is compelled to deem the same waived. *Code of Pro.* § 148.

It is also claimed that the judgment should be affirmed, on the ground that the report of the referee is not embraced in the case. The practice has been so long and well settled on this point, that there ought not now to be any misapprehension in regard to it. If there was no report of the referee in this case, containing his findings of fact and conclusions of law, for the reasons given in Ackley *v.* Dygert (not reported), the judgment should be affirmed. But we have here the required report, and the only error is that it is printed in the wrong place. It should have been inserted in the case, immediately after the testimony, and preceding the exceptions taken to it. As its location in the judgment roll is manifestly an inadvertence, we should, on application, allow it to be inserted in the case, in its proper place. We regard the proceedings, as thus amended, in conformity with the injunctions of section 173 of the Code.

The simple question, therefore, presented on this appeal, is whether, upon the face of the assignment, there is anything appearing which renders it void in law. It purports to transfer to the defendants all the joint and several property of the assignors, in trust, in the first place, to pay all notes, drafts or bills indorsed by the assignees, or either of them, made by the firm of Dean & Brown, the assignors, and by the firm of Dean, Brown & Strong, to which latter firm that of Dean & Brown had succeeded, or made by any or either of the individuals of said firms. The partnership property of the firm of Dean & Brown is thus, in the first place, to be appropriated as well to relieve the sureties and indorsers of the firm, as those of the individual members of the firm, and also all liabilities incurred on account of Strong, a former partner of the firm of Dean, Brown & Strong. This brings this case directly within the principle decided by this court in Wilson *v.* Robertson, 21 *N. Y.* 587.

We there said that "it seems very plain that the insertion of such a provision in the assignment of the partnership effects of an insolvent firm is a violation of the statute in respect to fraudulent conveyances, and furnishes conclusive evidence of a fraudulent intent on the part of the assignors. Its operation was not only to hinder and delay the plaintiffs, as creditors of

the firm, but, if successful, to cheat them out of their entire demand." It was very pertinently said that "the firm is not liable for the private debts of one of its members, nor is there any liability resting upon the other members in respect to those debts. An appropriation of the firm property to pay the individual debt of one of the partners is, in effect, a gift from the firm to the partner, a reservation for the benefit of such partner or his creditors, to the direct injury of the firm creditors." Such assignment and appropriation were held to be a direct fraud upon the joint creditors of the assignors.

The same ground was taken by the supreme court, to uphold the assignment in that case, as is taken by the referee and the supreme court to maintain the assignment in this case, namely: that the provision violated no statute, but only a principle of the common law, which gives partnership creditors a preference in payment out of partnership property over the individual creditors of the several partners. Hence, it did not invalidate the whole assignment by rendering it fraudulent and void. Being inequitable in reference to the partnership creditors, and an infringement of their rights, the provision was an illegal one; but not being fraudulent, it did not vitiate any other part of the assignment. These views were repudiated by this court in Wilson *v.* Robertson, *supra*, and it was held that this provision showed a fraudulent intent on the part of the assignors, which rendered the assignment wholly fraudulent and void.

The referee before whom the action was tried, found that it was not proven that there were any individual debts of the several partners, or of Horatio G. Strong, of the character mentioned in the assignment. It was not incumbent on the plaintiffs to show that there were any such debts. The appropriation of the partnership assets to the payment of the individual debts of the several partners, showed such a fraudulent intent on the part of the assignors, as to vitiate the assignment and render it fraudulent and void. It is not relieved from this taint by the absence of any proof that there were debts of the character mentioned. The referee and the supreme court should have held that the assignment was fraudulent and void upon its face.

The judgment appealed from should, therefore, be reversed, and a new trial ordered, with costs to abide event

BROWN, J. [After stating the facts.]—The connection of Horatio G. Strong with the firm, and the change of the firm name to that of Dean, Brown & Strong, can have no sensible effect upon the questions brought up for consideration here, and may therefore be dismissed without further notice. Strong became liable as a copartner for the debt contracted during the brief period of his connection with the business. The questions we are to consider, however, still remain the same. The same may be said of the subsequent agreement by which Strong and Stephen S. Westcott were to become the purchasers of the property and effects of the firm. Never having been executed, it seems to be of no moment in the present controversy.

The plaintiffs claim that the provision in the deed of assignment which provides for the payment of the individual debts of the members of the firm, out of the assigned property, in preference to the debts of the firm, renders the deed fraudulent and void as against the firm creditors. No one will now claim that such a provision in such an instrument is legal, but whether its presence has the effect to vitiate the whole transaction, seems, until lately, to have been the subject of some doubt. The late chancellor had occasion to consider the subject in the case of Kirby *v.* Schoonmaker, 3 *Barb. Ch.* 46 Schoonmaker and Gasharie had been copartners in trade, and made an assignment for the payment of their debts. The deed provided for the payment of nine hundred dollars to Schoonmaker's mother out of his joint or separate portion of the proceeds of the assigned property, five hundred and fifty dollars of which was his separate debt and the residue the debt of the firm. It also provided for the payment, out of Gasharie's joint or separate portion of such proceeds, of six hundred dollars to his mother, which was his separate debt. These debts had a preference over all the creditors of the firm, except one for five hundred dollars, which was directed to be first paid. The bill was filed by a judgment creditor. It alleged no fraud, nor did it appear that the partners were insolvent. The bill was dismissed upon this ground alone, for upon no other

ground can the decision be sustained consistently with the case of Wilson *v.* Robertson, 21 *N. Y.* 587. The chancellor, in his opinion, saying, "If the giving a preference to the individual creditors, or placing them upon a equality with the creditors of the firm, is merely inequitable in reference to a portion of the individual debts, but is not fraudulent, the bill should be filed in behalf of the complainants and the other creditors of the copartnership having a common interest with them." He did afterward proceed to consider, to some extent, whether the presence of such a provision in a deed of assignment rendered it fraudulent and void, so as to authorize a firm creditor to file a bill, for his own benefit, to set aside the assignment as void. But he overlooked, or did not attach any importance to, the fact which, in my judgment, is fatal to this class of assignments, that the property of one of the copartners is appropriated to the payment of debts which he does not owe.

In the case referred to, the separate debt of Schoonmaker, due to his mother, was not the debt of the firm, nor was it the debt of his copartner, Gasharie. And so it was apparent that the property of the latter—that is, his interest in the property and effects of the firm—was, by the deed of assignment, appropriated to pay a debt which he did not owe, in preference to the debts of the firm of which he was a member, which he did owe, and was under legal obligation to pay. These deeds of assignment giving preferences, are tolerated and upheld by the courts when they devote the entire property of the assignor to the payment of his debts. If the deed reserves anything to the assignor himself, or to the members of his family or to anyone else except his creditors, it becomes absolutely void as to his creditors. When the firm debts are paid, if the partner has none of his own, he may devote what may be left to him to pay the individual debts of his copartner. But he can no more devote it to that purpose in preference to the payment of what he owes individually or jointly as a member of the firm than he can reserve it to himself, leaving the firm debts unpaid. This is upon the obvious rule that the property of the debtor equitably belongs to his creditors to the extent of the payment of their debts. The relations which the copartners maintain to the property of the firm, entitle them sometimes, but not

always, to have all its property in the first place applied to pay the copartnership debts. And so the court of chancery, when it obtains jurisdiction over a copartnership fund through the bankrupt laws, or upon the dissolution of the firm through the death of one of the copartners, will observe this rule of equity and make distribution by applying the proceeds of the copartnership property, in the first place, to the payment of the firm debts, and the proceeds of the property of the individual partners to the payment of their individual debts before applying it to pay the debts of the firm. All this, however, has little to do with our present inquiry, which is simply to determine whether a deed of assignment made by a firm, and which provides for the payment of the individual debts of one of the copartners, and for which the others are not liable, in preference to the debts of the firm, can be upheld as a valid assignment and a legal disposition of the firm property as against the firm creditors. The converse of the proposition will not be disputed. For as there is no rule of equity which gives to the creditors of the individual members of the firm a lien upon their individual property while it is still within their control, there can be no legal objection to an assignment of it in trust to pay copartnership debts in preference to debts due from them individually, for both classes of debts are the debts of the assignors, which they are under a legal obligation to pay. The case of Wilson *v.* Robertson, *supra*, decides the question we are considering, and holds that the provision to pay the individual debts out of the firm property, in preference to the debts of the firm, renders the deed void, as against the firm creditors.

[The learned judge proceeded to express the opinion that as the referee had found that no individual debts had been paid, and the proofs did not affirmatively disclose any individual debts, the clause might be treated as nugatory, and the assignment upheld.]

All the other judges concurred with DAVIES, J., in holding that the burden of showing the non-existence of such debts rested on the parties claiming under the assignment, and a finding that the evidence did not show the existence of such debts was not sufficient.

Judgment reversed, and new trial ordered, costs to abide event.

HYDE *v.* LATHROP.

December, 1867.

Under a contract for the sale of thirty thousand barrel staves, at a specified rate per thousand, to be delivered at a designated railroad depot,—*Held*, that delivery of seven thousand at the depot was sufficient to pass the title of the seller in the staves that were so delivered, although the buyer had not seen them, and no count had been made to ascertain the amount to be paid.

Harvey W. Hyde sued John P. P. Lathrop, in the supreme court, in an action in the nature of replevin, for about seven thousand flour barrel staves.

The plaintiff, and Hitchings, and Oliver, made a contract in writing, in these words:

"$30. Received of H. W. Hyde, thirty dollars, to apply on thirty thousand flour barrel staves, at seven dollars per thousand, gross count, which are to be delivered at the Buffalo, Corning & Genesee Valley Railroad depot, within three weeks To be delivered on the cars. Dated Le Roy, June 26, 1856.

(Signed) "SCOVILL HITCHINGS,
WILLARD OLIVER."

The referee who tried the action found the following facts: That, on June 26, 1856, the plaintiff took from Hitchings & Oliver the contract above mentioned. That at the time of the making of the contract the plaintiff paid to said Hitchings & Oliver thirty dollars. That on July 8 afterward, he paid them the further sum of thirty dollars. That on July 1, 1856, he paid them the further sum of twenty-five dollars. That on August 26, aforesaid, he paid them the further sum of thirty dollars; and on September 15 of the same year, he paid them the further sum of ten dollars. After the execution of said contract, and in the month of July, 1856, the said Hitchings & Oliver delivered to the plaintiff ten thousand four hundred and sixty-four staves, under and upon said contract, upon a car

at the railroad depot at Le Roy, and the same were taken to Scottsville, and received by the plaintiff. That after the making of the said contract aforesaid, the same was modified so that the said Hitchings & Oliver were not bound to deliver the staves upon the cars at the depot aforesaid, except the one load of ten thousand four hundred and sixty-four, delivered in the month of July aforesaid, and that the balance of said thirty thousand staves was to be delivered at the said railroad depot at Le Roy aforesaid. That after the delivery of the said ten thousand four hundred and sixty-four staves, and before September 21, 1856, the said Hitchings & Oliver drew and delivered about seven thousand staves at the railroad depot in Le Roy, and piled them near the railroad track, in pursuance of said modified contract, and to apply on the same, being the same staves mentioned and described in the complaint. That, upon said seven thousand staves, one Alonzo S. Upham had a claim or lien for seven dollars and fifty cents, which was subsequently paid by the defendant in this action. That on November 9, 1855, Olmstead & Adams recovered a judgment before a justice of the peace against said Oliver, for twenty-two dollars and sixty-eight cents, and execution was issued thereon, and the same was renewed from time to time, and was finally renewed August 14, 1856. That on August 26, 1856, one Clarke also duly recovered a judgment before a justice of the peace against said Oliver, and execution was thereupon issued on said last-mentioned judgment to one Shumway, a constable, who had the execution on the previous judgment, and who had levied on thirty-five hundred of the staves in controversy, and which levy had been made after said staves had been delivered at the depot at Le Roy aforesaid. That on August 26, 1856, said Clarke recovered another judgment against said Oliver, before the same justice, for nine dollars and eighty-four cents, upon which execution was issued on September 9, 1856.

On the said September 9 the executions upon the judgments of Clarke were placed in the hands of Shumway, the constable, and he entered upon them a memorandum of a levy on the same day. On September 20, 1856, Shumway, as constable, sold on the three executions before named, the whole of the staves in controversy, about seven thousand in number, three thou-

sand five hundred having been drawn to the depot, between the day of the levy and the day of sale, and said staves were bid off for defendant and removed by him.

That Hitchings and Oliver were partners in getting out the staves in question, and said Oliver died a few days prior to October 4, 1856. That, on October 14, 1856, the said Hitchings, as survivor, made an assignment and transfer of all the right and title of said Hitchings and Oliver, of, in and to said staves, to the plaintiff.

The referee found the property in the staves in question, at the time of the taking of them by the defendant, to be in the plaintiff, subject to the lien of seven dollars and fifty cents of the said Upham. That the value of the staves at the time of the taking of the same by the defendant was forty-five dollars, after deducting Upham's lien. That the damages for the detention of the staves were twelve dollars and forty-three cents. The referee found, as conclusions of law:

1. That, at the time of the taking of the staves, the plaintiff was entitled to the possession of them as owner.

2. That the lien of Upham did not give to the defendant the right to take and hold the staves.

3. That the payment of the lien of Upham did not operate as an assignment of the lien of Upham to the defendant.

The referee gave judgment for the plaintiff in accordance with his report.

The supreme court, at general term, affirmed the judgment, upon substantially the same grounds as those assigned by this court.

George F. Comstock, for defendants, appellants;—Cited Comfort *v.* Kiersted, 26 *Barb.* 472; Andrews *v.* Durant, 11 *N. Y.* (1 *Kern.*) 40; Newcomb *v.* Cramer, 9 *Barb.* 402; Johnson *v.* Hunt, 11 *Wend.* 138; Ward *v.* Shaw, 7 *Id.* 405; *Pothier on Contr. of Sale*, part 4, 308; Olyphant *v.* Baker, 5 *Den.* 381; *Add. on Contr.* 223, 224; 1 *Pars. on Contr.* 441; *Plowden*, 298; 8 *Dow. & R.* 703; 5 *Barn. & C.* 862; Hanson *v.* Meyer, 6 *East*, 227; Withers *v.* List, 4 *Camp.* 237; 2 *Bing. N. C.* 151; 3 *N. H.* 382; 25 *Penn.* 203; 18 *Id.* 91; 14 *Maine*, 400; 3 *Barn, & A.* 321,

T. R. Strong, for plaintiff, respondent;—Cited Clark *v.* Dales, 20 *Barb.* 64, and cases cited; Scovill *v.* Griffith, 12 *N. Y.* (2 *Kern.*) 509; Crofoot *v.* Bennett, 2 *N. Y.* (2 *Comst.*) 258; Tyler *v.* Strang, 21 *Barb.* 198; Wooster *v.* Sherwood, 25 *N. Y.* 278; Grant *v.* Morse, 22 *Id.* 323; Brainerd *v.* Dunning, 30 *Id.* 216.

By the Court.—Davies, Ch. J.—Upon the facts found by the referee and those which we are authorized to assume he found, there is no serious embarrassment in sustaining this judgment. The real question in the case is, in whom was the property of the seven thousand staves at the time of the levy thereon by the constable,—in the plaintiff or in Hitchings and Oliver? The referee has found as a fact that the property was in the plaintiff, subject to the lien thereon of Upham for the seven dollars and fifty cents.

If this were purely a question of fact, this finding is conclusive upon this point. But it cannot be questioned that the title to the staves would have become absolute in the plaintiff by a delivery of them and an acceptance thereof. Now, the referee has distinctly found that such delivery was made in conformity with the terms of the modified contract, and to sustain the judgment upon the referee's contract, we are warranted in assuming that he also found that the same had been accepted by the plaintiff.

These facts show that the title of the staves was vested absolutely in the plaintiff, and there was left no leviable interest in the defendant in the executions in the hands of the constable.

The cases of Crofoot *v.* Bennett, 2 *N. Y.* (2 *Comst.*) 258, and Tyler *v.* Strong, 21 *Barb.* 198, are satisfactory and conclusive authorities that the title to these staves vested absolutely in the plaintiff, upon their delivery at the railroad depot. The general rule undoubtedly is, that if goods be sold while mingled with others by weight, number or measure, the sale is incomplete, and the title continues with the seller, until the bargained property be separated and identified. 2 *Kent Com.* 496. And the reason is that the sale cannot apply to any article until it is clearly designated and its identity thus ascertained.

In Crofoot *v.* Bennett, *supra*, Judge Strong said: "But if the goods are clearly identified, then, although it may be neces-

sary to number, weigh or measure them, in order to ascertain what would be the price of the whole, at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale, in order to determine the entire force of the whole, the sale is valid and complete."

In Tyler *v.* Strong, *supra*, a quantity of lumber was piled up and delivered, but the exact quantity and the amount to be paid therefor could not be ascertained, until a measurement thereof had been made. The evidence tended to prove that the lumber was piled by itself, preparatory to shipping, and that possession of the whole of it was delivered. The court say: "If such was the fact, a measurement was not necessary to vest the title in the plaintiff. It is only when something remains to be done, which is by the contract a condition precedent to the passing of the title, that the title will not pass until the act be performed."

In the case at bar nothing remained to be done after the delivery of the staves at the railroad depot, but to ascertain the quantity for the purpose of determining the amount to be paid therefor.

By the contract the same were to be paid for at "seven dollars per thousand, gross count." Under such circumstances a count was not necessary to vest the title in the plaintiff. The correct rule for determining whether the title passed to the vendee, of articles to be manufactured by the vendor, is undoubtedly well stated by Judge HARRIS in Comfort *v.* Kiersted, 26 *Barb.* 472. In that case the contract was for the manufacture and delivery of shingles, with a proviso, that they would become the property of the vendee as manufactured. Judge HARRIS says: "Before the title would vest, even after the shingles had been made, something must have been done which would at least amount to a constructive delivery. The shingles must have been in some way designated and set apart, so as to be capable of being identified as the property of the purchasers."

All these requirements are found in the case now under consideration.

It may be conceded that the admission of the newspaper,

under date of September 3, 1856, containing the advertisement of a circus, to be held at Le Roy, on the 8th of that month, for the purpose of identifying the day when the plaintiff was in that place, was not competent evidence to prove the fact that a circus was to be held there on that day. The plaintiff had testified on his cross-examination that he was in Le Roy before September 15, and said: "It was on the day of the circus." that "these staves were then there, on the west side of the depot, about 7,000."

It was not claimed on the part of the plaintiff that he did any thing with, or in respect to, the staves, at the time he thus saw them.

The constable made his levy upon half of them on September 8, and on the 9th upon the whole seven thousand. It is, therefore, undeniable that the whole seven thousand staves had been delivered at the railroad depot, anterior to September 8, in pursuance of the terms of the modified contract, and if such delivery vested the title to the staves in the plaintiff, as it is believed it has been shown it did, then it follows that it was wholly immaterial upon what day the plaintiff first saw the staves.

The fact of his seeing them, or the time when, were not elements in the vesting the title to them in him, and the admission of this newspaper notice worked, therefore, no injury to the defendant.

These considerations dispose of all the grounds urged upon us for a reversal of this judgment.

We do not see any sufficient reasons for such reversal, and we are, therefore, of the opinion that the judgment should be affirmed, with costs.

All the judges concurred, except PARKER and PORTER, JJ.

Judgment affirmed, with costs.

JENKINS *v.* WHEELER.

[No. 1 of this name.]

December, 1867.

Affirming 4 *Robt.* 575.

In an action on a contract for services, to recover compensation for part performance, the objection that the contract was entire, so that full performance must be shown, if not taken at the trial, is not available to defendant on appeal.

Where a master of a ship was engaged for the outward and return voyage, at a monthly compensation, and in consequence of unseaworthiness he abandoned the voyage at an intermediate port, and abandoned the ship to the insurers, he cannot recover wages for the time subsequent to his ceasing actually to serve as master.

Oliver N. Jenkins (for whom, on his death pending the action, Catherine A. Jenkins, administratrix, was substituted as plaintiff), sued David E. Wheeler, in the New York superior court, to recover for services rendered under a contract. Jenkins was engaged by one Anthony Pelletier to take charge of the bark Peytona, on her contemplated voyage from New York to Australia; and on February 8, 1853, entered into a contract signed by defendant (in whose name the title to the bark stood), substantially as follows: Jenkins agreed to take charge of the bark, then lying in the port of New York, for her voyage to Australia and return to New York, according to instructions given him by Anthony Pelletier, and to use his best efforts for the interest of the bark and its owners. And defendant agreed to pay Jenkins for his services, one hundred and fifty dollars for each and every month of the outward and return voyage.

Pelletier, and Overman & Gruner owned the bark, and were the only persons beneficially interested in her voyage, the sole control of which was assumed by Pelletier.

On the trial, the defendant offered to prove that he signed the agreement with Jenkins for Pelletier, and Overman & Gruner solely, on whose behalf he held the naked legal title to the bark; that Jenkins, in making the agreement, gave credit to,

and relied upon, the responsibility of said Pelletier, Overman & Gruner, and not upon that of defendant. To this evidence plaintiff's counsel objected, and it was excluded.

It appeared that the bark sailed from New York soon after the date of the agreement, but was compelled, in the judgment of the master, to put into the port of Bahia, South America, by reason of shortness of water; and again, for want of water and fresh provisions, after leaving Bahia, to put into Cape Town, on the coast of Africa; and after leaving Cape Town, having encountered heavy winds, and lost her rudder, and being in a leaky condition, to put into Port Louis, on the Island of Mauritius, where she arrived August 16, 1853. On September 8, following, she was abandoned to the underwriters by the captain, and advertised for sale; and the further voyage was then abandoned.

The judge charged the jury that plaintiff was entitled to recover of defendant one hundred and fifty dollars a month, from February 8, 1853, to November 25, 1853, and for such further time as would be reasonably required for Jenkins to return to New York from Mauritius, by the first usual mode of conveyance that presented itself after November 25, 1853, with interest on the aggregate amount from February 14, 1855; unless the voyage was broken up through the unskillfulness, negligence, fault or fraud of Jenkins, in which event defendant was entitled to a verdict; or unless some damage had accrued to defendant from the fault, negligence, unskillfulness or fraud of the captain in the line of his duty.

The jury found for plaintiff, five thousand two hundred and eighty-five dollars, being monthly wages up to October 11, 1854, the time of arrival in New York, and interest thereon from February 14, 1855. The judgment entered was affirmed, at general term, after deducting from it the amount allowed for wages from May 27, 1854, to October 11, 1854, amounting to six hundred and seventy-five dollars, with interest from February 14, 1855, amounting in all to one thousand one hundred and ninety-five dollars and fifty-three cents.

J. W. Edmonds, for defendant, appellant.

C. N. Black, for plaintiff, respondent.

DAVIES, Ch. J.—[The learned judge, after stating the facts, and reviewing Van Bokelin *v.* Ingersoll, 5 *Wend.* 315; Macy *v.* Wheeler, 30 *N. Y.* 231; McMillan *v.* Vanderlip, 12 *Johns.* 165; Reab *v.* Moor, 19 *Id.* 337; Webb *v.* Duckingfield, 13 *Id.* 390; Burrill *v.* Cleeman, 17 *Id.* 72; Smith *v.* Brady, 17 *N. Y.* 173; Cunningham *v.* Jones, 20 *Id.* 486; Baker *v.* Higgins, 21 *Id.* 397; Oakley *v.* Morton, 11 *Id.* 25; Harmony *v.* Bingham, 12 *Id.* 99; Tompkins *v.* Dudley, 25 *Id.* 272; Adams *v* Nichols, 19 *Pick.* 275, expressed the opinion that the contract of the plaintiff's intestate with the defendant was for the round voyage, and an entirety; and that the compensation, therein specified, was to be made on its performance; that such performance was a condition precedent, and no action could be maintained until such performance had taken place; unless the party, upon whom such performance rested, established a valid and legal excuse for such omission or non-performance; that none such had been shown in this case, and, as a consequence, neither the plaintiff nor her intestate was entitled to claim such compensation. The majority of the court not concurring in this view, the opinion concluded as follows:]

The majority of the judges, are, however, of the opinion, that this point was not raised upon the trial of this action, and therefore, is not now available to the defendant. But they are of the opinion, that the exception to the charge, as to the time for which wages were recoverable, if recoverable at all, that they could not be recoverable for a longer period than from the inception of the contract sued on, to the breaking up of the voyage, presents the question distinctly, for what period of time the plaintiff is entitled to recover the wages of the captain, from the defendant. This court is of the opinion, that such recovery must be confined to the period during which Captain Jenkins performed the services as master, namely, from the time of the inception of the voyage on February 8, 1853, to the date of its abandonment and breaking up, September 8, 1853.

The judgment appealed from is therefore affirmed, without costs of this appeal, if the plaintiff elects and consents to deduct all allowances for wages after September 8, 1853, and interest thereon included in the judgment. If she does not so elect and consent, within twenty days after notice of this judgment, then

the said judgment is reversed, and a new trial ordered, costs to abide the event.

All the judges concurred in this conclusion.

Judgment, if plaintiff accepts the above terms, affirmed; otherwise reversed and new trial ordered, costs to abide event.

JENKINS *v.* WHEELER.

[No. 2 of this name.]

December, 1867.

Where the *nominal* owner of a vessel executes a mortgage thereon to secure money loaned to the real owner, for the benefit of the vessel, the mortgage containing no covenant by the mortgagor to pay, he is not personally liable for the debt.

Oliver N. Jenkins (for whom, on his death pending the action, Catharine A. Jenkins, administratrix, was substituted as plaintiff) brought this action in the New York superior court, against David E. Wheeler.

The facts appear in the opinion.

C. N. Black, for plaintiff, appellant.

J. W. Edmonds, for defendant, respondent.

By the Court.—Davies, Ch. J.—The complaint avers that Oliver N. Jenkins, the plaintiff's intestate, on February 8, 1853, loaned to the defendant the sum of two thousand dollars, and as a security therefor, the defendant executed to him a mortgage on five-eighths of the bark Peytona, then lying in the port of New York. That, at the time said loan was made, and as a condition for making the same, the defendant agreed to obtain an insurance on said five-eighths of said bark, in the sum of two thousand five hundred dollars, for the benefit of the plaintiff, and payable to or to be assigned to him. That afterward the vessel sailed from New York, and on August 16, 1863, was damaged and found unseaworthy, and was abandoned

to the underwriters; and that, as plaintiff believes, large sums of money had been collected by the defendant for insurance effected by said defendant upon said bark. That plaintiff had demanded said policies of insurance from said defendant, which he wholly neglects to deliver to him. Plaintiff avers that he would not have loaned the said sum of two thousand dollars except upon the promise of said defendant to effect said insurance. Plaintiff says, that in consequence of the defendant failing, neglecting and refusing to deliver said policies of insurance to the plaintiff, or to account to him as aforesaid, he had sustained damage to the amount of two thousand dollars, and interest from February 8, 1853. Wherefore said plaintiff demanded judgment for said sum and interest

Defendant, by his answer, denied that said Jenkins loaned him two thousand dollars on said February 8, 1853. The defendant admits that he executed a mortgage to the said plaintiff, but denies that the money therein mentioned was loaned to him, but avers that the mortgage was executed to secure a loan of the sum of two thousand dollars, made by said Jenkins to Anthony Pelletier, and that said mortgage was executed as collateral security for the same. That said bark, her tackle, &c., was in possession of the plaintiff, Jenkins, at the time of said mortgage, and that defendant was never the owner thereof. That said plaintiff well knew, at the time of said loan, that the defendant was not the owner of said bark, and had no interest whatever in it, and that said mortgage was issued by the defendant, because said bark stood in his name at the custom-house and for no other reason whatever. Defendant denied that he ever agreed to obtain said insurance for said Jenkins. He also denied that the underwriters had ever paid him any sum of money whatever on insurance policies effected by him on said bark. Defendant also denied all the other allegations of the complaint.

The plaintiff, Jenkins, having died, the action was continued in the name of the present plaintiff, his representative.

Upon the trial, the plaintiff produced the mortgage, dated February 5, 1856, executed by the defendant Wheeler, which was given upon five-eighths of said bark, to secure the sum of two thousand dollars, but which contained no covenant or

agreement to pay the same, by said defendant, Wheeler, but the defeasance clause was in these words: "Provided, nevertheless, that if Anthony Pelletier, his executors, &c., or any of them, do and shall well and truly pay unto the said Oliver N. Jenkins, his executors, &c., the sum of two thousand dollars and interest at the rate of seven per cent. per annum, on or before one year from the date thereof, then these presents and everything therein contained should cease and be void, otherwise to remain in full force and virtue."

It also appeared, that, on said February 5, 1853, the said Pelletier made and executed, and delivered to said Jenkins, his bond in the penal sum of four thousand dollars, conditioned to pay the sum of two thousand dollars on or before one year from the date thereof, with interest thereon at the rate of seven per cent. per annum, and which contained this clause: "which said sum is secured to be paid by a certain mortgage of even date herewith, on the bark Peytona (now lying at the port of New York), and if said mortgage is paid according to the conditions therein expressed," then that obligation was to be void.

The mortgage and this bond demonstrate conclusively, that this sum of two thousand dollars was, in fact, loaned by Jenkins to Pelletier. In addition, Pelletier, a witness on the part of the plaintiff, testified that Jenkins was to loan the two thousand dollars to him for his (witness') benefit, and that he was to secure him by his bond and a mortgage on the ship. He also testified, that Jenkins had agreed to loan him two thousand dollars, and that he took Jenkins to the defendant's office to prepare the paper which he was to give to Jenkins to secure him for the loan.

There was no conflicting testimony on this point, and it is very clear, therefore, that Jenkins did not loan the two thousand dollars to the defendant, but that it was loaned by him to Pelletier.

Equally satisfactory is the proof of the alleged agreement by Wheeler, to procure for Jenkins a policy of insurance on the vessel to the amount of two thousand five hundred dollars. A witness testified, that Jenkins and Wheeler were in his office about the time Jenkins was to sail, and he overheard a conversation between Jenkins and a brother of the witness, Wheeler

being present; and at the same time, the witness' brother delivered Jenkins some money. Jenkins turned toward the counter, and said there were certain papers that were not then ready, but that Mr. Wheeler would get them ready, and inclose them in an envelope, and send them to the office for us to transmit to his wife, Mrs. Jenkins; he mentioned what papers they were; he mentioned that there was to be an agreement, a bond and mortgage, and a policy of insurance; he did not state for how much. This witness said he did not see Jenkins pass any money to Wheeler.

The witness was asked, "Was there anything said as to what the policy of insurance was to be upon?" Answer: "I can't say, any more than it was to secure this loan; I can't say what it was to be upon." He was then asked, "Did Wheeler say anything that you recollected particularly?" Answer: "He made no objection." It thus affirmatively appears that the defendant made no agreement to procure a policy of insurance, or promised to procure one. The witness Pelletier testified, that "the ship was mine, and I had to secure Jenkins for the money that went to my benefit, . . . therefore, I was in duty bound to insure it, as it was far more valuable to the vessel; I promised Captain Jenkins I would see him insured before he would see Mr. Wheeler." This witness also testified, that he effected an insurance for the full value of the vessel. He further testified, that the two thousand dollars received from Jenkins, went to his benefit in the account with Overman & Gruner.

This evidence furnishes no basis for the allegation that the defendant engaged, or promised to effect an insurance on the vessel, as security for the loan of two thousand dollars. That loan was made to Pelletier, the money received by him, negotiated by him with Jenkins, and the engagement and promise to procure the insurance for the benefit of Jenkins, were made by Pelletier. There is no evidence that any such engagement or promise was ever made by the defendant. Neither was there any liability created, as against the defendant, by reason of this loan to Pelletier, assuming that it was made for the benefit of the vessel, from the circumstance that the title stood in the defendant's name at the custom-house. The defendant was

not in possession of the vessel, and did not control it. The question of his liability, in this aspect, was settled by this court in the case of Macy *v.* Wheeler, 30 *N. Y.* 231.

The plaintiff was properly nonsuited, and the judgment thereon should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs.

JESSOP *v.* MILLER.

September, 1864.

The surety in the undertaking given to obtain a provisional remedy in an action, is not incompetent as a witness, for he is not a person for whose benefit the action is prosecuted or defended.

Assignees for benefit of creditors, who innocently and without notice take possession of chattels of which their assignor tortiously acquired possession, are not liable in an action by the true owner for their recovery, without demand and refusal.*

A demand should be made on each of several such assignees; but on proof of demand on, and refusal by, either one, plaintiff may recover against him without proof of a demand on the other.

A refusal to deliver plaintiff's property to him upon demand, may be left to the jury as presumptive evidence of a conversion before the bringing of the action,† although the demand was made after the papers in the action were delivered to the sheriff.

Upon the question of the validity of a sale made on condition as to payment, the condition not being performed, the intent of the purchaser to pay or not is immaterial, where no fraud is imputed to him, or where he testified that he had no intention of taking the goods; and it is not error to exclude an inquiry as to whether he intended to pay.

Thomas and Sidney Jessop sued Stephen C. Miller, George N. Furguson and Miles White, in the supreme court, to recover possession of nine cases of steel, belonging to plaintiffs, which they alleged defendant had become possessed of and wrongfully detained.

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* Compare King *v.* Fitch, in this series; and Chambers *v.* Lewis, 26 *N. Y.* 454.

† Cited in McEntee *v.* N. J. Steamboat Co., 45 *N. Y.* 34.

White was a manufacturer of steel, and purchased, or negotiated with plaintiffs, to purchase from them the steel now in suit, and in consequence of their negotiation, they sent the steel to his factory. White broke and partly manufactured the steel, and subsequently failed, and made an assignment of all his property to Miller and Furguson, the other defendants. The plaintiffs then commenced this action to regain the steel, and took proceedings of claim and delivery, as a provisional remedy under the Code of Procedure, for that purpose. The papers in the suit were delivered to the sheriff for service before any demand was made for a return of the steel.

The question on the trial was whether plaintiffs made merely a conditional sale, as they alleged, to take effect only on the delivery to them of White's notes indorsed by the firm of Johnson, Cammel & Co., of New York; or whether, as Miller and Furguson claimed, the sale was absolute, and vested the title in White without payment. Miller and Furguson also insisted that if the sale were originally conditional, the condition had been waived. Plaintiffs gave evidence in support of their claim. Their principal witness was their agent, Stagg, who was their surety on the undertaking given on their part in the proceedings of claim and delivery. He was objected to on this ground, but admitted by the court.

The receipt of the nine cases at White's shop in October or early in November, 1852, was admitted. The assignment was made December 8, following, and was expressed to convey all White's property.

On the part of the defendants, White was called as a witness, and testified, among other things, that he only ordered one case of steel, and that the nine cases in suit were sent him in addition. He was then asked by defendants' counsel, "When you bought the steel did you intend to pay for it?" This question was excluded. Other details of the evidence appear in the opinion.

Among other instructions, the court charged the jury, that if they should be satisfied from the evidence that the sale to White was not absolute, and that at the commencement of the suit there was a detention of the property by defendants, plaintiffs were entitled to recover. Also that it was for the

the jury to say from the evidence, what amount of the steel had come to the possession or control of Miller & Furguson, as assignees of White.

To the latter instruction, as also to a refusal to charge specifically that the assignees were not liable for steel not shown to be actually in their control at the commencement of the action, and that White was not liable, there being no evidence that he then had possession or control,—defendants severally excepted. Other exceptions, and the motion for nonsuit, appear in the opinion.

The verdict found for plaintiffs for nine hundred and two dollars and seventy-eight cents, was set aside at special term, on the ground that the court should have charged as requested, that the assignment, alone, was not enough to show that the assignees had possession of the assigned property, and that there was no evidence that White had anything to do with it after the assignment, nor of a joint conversion by White and the assignees; and that the latter were not liable till after refusal to deliver on a demand made.

The supreme court, at general term, were of opinion that the exceptions to the refusals to charge were insufficient to raise these questions, inasmuch as neither request covered a precise and single ground of defense, stated separately from other points of law or facts; but that there ought to be a new trial because there was no evidence to sustain a verdict of a *joint detention*;—that the plaintiffs' claim, that to make this ground available, there should have been a pleading of the misjoinder of the defendants, could not be allowed; for the action, sounding in tort, was in its nature several, and there may be a verdict for one defendant and against another; and the verdict should be determined not by the pleadings, but by the proofs;—that the assignment was an open, avowed, general assignment, for the benefit of creditors; and there was no evidence that it had particular reference to the property in question, or to a covering up of either the title to or the possession of it.

From this decision the plaintiffs appealed, stipulating for judgment final against them, if the order should be affirmed.

H. G. Wheaton, for plaintiffs, appellants;—As to witness, cited Neas *v.* Mercer, 15 *Barb.* 375, 382; Catlin *v.* Hanson, 1 *Duer*, 306; Western *v.* Hatch, 9 *How. Pr.* 444. As to conversion, Allen *v.* Crary, 10 *Wend.* 349; Brockway *v.* Burnap, 16 *Barb.* 309; Ely *v.* Ehle, 3 *N. Y.* (3 *Comst.*) 506; Van Neste *v.* Conover, 20 *Barb.* 547; Ward *v.* Woodburn, 27 *Barb.* 346; Douglass *v.* Howland, 24 *Wend.* 35, 45. As to the demand and joint liability, Acker *v.* Campbell, 23 *Wend.* 372; Waterbury *v.* Westervelt, 9 *N. Y.* (5 *Seld.*) 598.

John K. Porter, for defendants, appellants;—As to witness. cited Catlin *v.* Hanson (*above*); Howland *v.* Willett, 9 *N. Y.* (5 *Seld.*) 170. That demand after suit was not sufficient, Barrett *v.* Warren, 3 *Hill*, 348; Fuller *v.* Lewis, 13 *How. Pr.* 219.

By the Court.—Mullin, J.—The first alleged error presented by the record in this case is the admission of Stagg as a witness for the plaintiff, he being, as it is claimed, a person for whose immediate benefit the action is prosecuted, having signed the undertaking required by the Code to be given in proceedings for the claim and delivery of property.

Stagg could derive no benefit whatever from the suit, except by being released from his undertaking. He had an interest which, under the former practice, would have excluded him from being a witness, until another undertaking had been substituted. Interest is no longer a ground for exclusion. Stagg had no power, as surety in the undertaking, to control the suit, nor to appropriate to his own use any part of its proceeds. The action was not prosecuted for his benefit, directly or indirectly If a person can neither control the action nor appropriate its proceeds, it is difficult to understand how it can be said to be prosecuted for his benefit. The defendant's counsel seems to think that Stagg was to be treated as if he had indemnified some person for the taking of the property. By section 209 of the Code, the undertaking is for the prosecution of the action, the return of the property, upon the payment to the defendant of such sum as may be recovered against the plaintiff. The sureties are to be approved by the sheriff, and he is liable to

the defendants for the sufficiency of the sureties, until the objection to them is waived, or they have justified, or new sureties be substituted and been justified. The action not being against the sheriff, indemnity to him could not convert the surety into a person for whose immediate benefit the suit was prosecuted. And indemnity to the defendants in the action, could not work out any greater change in the relations of the witness to the action. The case of Howland *v.* Willett, 9 *N. Y.* 170, has no application to the case. In that case the defendant was sued as sheriff, for unlawfully taking the plaintiff's property, and Edward Dwight was offered as a witness on the part of the defendant, and it appearing that he was a partner in the firm by which the judgment was recovered, on which the property in question was seized, and that the judgment had been assigned to said Dwight, and that he claimed the property and had indemnified the sheriff, it was held that he was a person for whose immediate benefit the action was prosecuted, and that he was, therefore, incompetent. There is no resemblance in the cases. The witness Stagg had not indemnified any person to the litigation, unless it was the defendant, and such indemnity does not affect the question of the competency of the indemnitor as a witness.

When the person offered as a witness is legally or equitably the owner of the property and entitled to its proceeds, or was entitled himself to the benefits of litigation by indemnity given to another, he is a person for whose benefit the action is prosecuted or defended. If he is a mere surety to enable another to prosecute or defend an action he is not a person for whose benefit the action is prosecuted or defended, and is not rendered incompetent as a witness under section 299 of the Code.*

The counsel for the defendants Miller and Ferguson, on the close of the plaintiff's case, moved to dismiss the complaint on the grounds that the goods in question were sold upon the credit of Johnson, Cammel & Co., and not of White, and that no demand was made on either of the assignees until after suit

* This section has since been amended so as to admit parties without reference to interest, except as against executors, &c.

commenced. The motion was denied, and the defendant's counsel excepted.

The witness Stagg had testified, before the plaintiffs rested, that he was one of the plaintiff's agents, and as such negotiated the sale to White; and that White offered to him, as indorsers of his paper for the steel he might purchase, the firm o Johnson, Cammel & Co., and that he told White he would accept them as indorsers, and it was upon the condition that they should become such that the sale of the steel was made. It is a very grave mistake, therefore, to say that the sale was made on the credit of White alone, and not on that of Johnson, Cammel & Co., also.

If the steel was held on a condition that was not complied with, the title never passed from the plaintiffs, and White acquired no title thereto, nor could he convey any to the assignees. Acker *v.* Campbell, 23 *Wend.* 372; Leven *v.* Smith, 1 *Den.* 571; Haggerty *v.* Palmer, 6 *Johns. Ch.* 437; The same *v.* Duane, 1 *Paige*, 321; Cary *v.* Hotailing, 1 *Hill*, 311; Smith *v.* Lynes, 5 *N. Y.* 41; Olmstead *v.* Hotailing, 1 *Hill*, 317.*

In order to maintain an action against White, no demand was necessary. His act was tortious, and he was liable in trespass for the unlawful taking. Farrington *v.* Payne, 15 *Johns.* 431.

But as the assignees acquired possession of the property innocently, without notice of any defect of title in White, an action could not be maintained against them until after demand and refusal. Hall *v.* Robinson, 2 *N. Y.* 293.

The assignees not being partners, a demand must be made upon each, in order to maintain a joint action. Mitchell *v.* Williams, 4 *Hill*, 13. It is not pretended that any demand was made of Ferguson, and hence the action as against him was not sustained. There was evidence sufficient to carry the case to the jury on the question whether a demand was made of the property of Miller, and whether there was a refusal by him; and the jury must have found such demand and refusal, as without it, there was no evidence of detention by the assignees, referred to by the judge in his charge to the jury.

* See also Ballard *v.* Burgett, 40 *N. Y.* 314, and cases there cited.

I do not understand the respondent's counsel to contend that there was not a demand and refusal by Miller; but the objection is that it was after suit brought; the papers in suit having been delivered to the sheriff at 11 A. M., and the demand not being made till 1 P. M. of the same day.

A demand and refusal do not constitute a conversion of property. They are but evidence of a conversion, and the conversion of which they are the evidence is prior to the demand and refusal. 2 *Phil. on Ev.* 226; *Cow. & Hill's* edition. The learned authors say: "The refusal of the defendant may be evidence of a conversion at an antecedent period; as when deeds were in the possession of the defendant prior to Michaelmas term, and the demand and refusal were proved to have been made on the day after that time, the court held it to be evidence of a conversion before the time." Milton *v.* Endlestom, 5 *Barn. & Ald.* 87, was trover for certain deeds that were shown to have been in the defendant's hands before the Michaelmas term. The bill was entitled generally of that term, the memorandum showed it was filed on November 28, but it was not in fact filed until December 24. The demand was made on November 29. The evidence of the actual time of filing was objected to as contradicting the record. But the court held it admissible; and they say a demand and refusal is evidence of a prior conversion; and as the deeds were in the defendants' hands prior to Michaelmas term, there was evidence for the jury of a conversion before that period.

In Morris *v.* Pugh, 3 *Burr.* 1241, the same question arose as to whether the actual time of filing the bill could be shown in opposition to the recital in the record; and it was held that it might. And Lord MANSFIELD takes occasion to say: "Refusal upon demand is not an actual conversion, but evidence of it. If the refusal on May 2 had really been after the action brought, I ought to have left it to the jury as evidence of a conversion before the bringing of the action."

In the case before us it is shown that the assignment was made and delivered on December 8. The action was commenced on or about December 17, and it was on the same day the demand was made. The demand and refusal were, under the cases cited, evidence to go to the jury of a conversion as

early as December 8; that is to say, refusal to deliver to the true owner on demand, is evidence, in the absence of all explanation, that the party refused it with the intent to set the real owner's right at defiance. The jury was justified in finding a conversion before suit brought. Miller is, therefore, liable to the plaintiffs for the value of the property.

It was held in Nicholas *v.* Michael, 23 *N. Y.* 264, that the fraudulent vendee of goods, and his assignee thereof for the benefit of creditors, are liable to a joint action by the vendor to recover the possession. White was, therefore, liable jointly with Miller and Ferguson for a conversion of the steel, and as to him no demand was necessary.

The court was requested to charge the jury, that there was no evidence to warrant them in finding that the whole of the steel claimed in this action ever came to the possession, or under the control of, the defendants, Miller & Ferguson. The court declined so to charge. All the steel sold by the plaintiffs to White was received by him and taken to his shop. There is no proof that he sold a pound of it, or that, by the course of business in his shop, a sale of any part of it might be inferred. As between the plaintiffs and White, there could be no doubt but that at the time of the assignment he had in his possession all the steel bought of the plaintiffs. And it seems to me the inference is equally strong against the assignees. By the assignment they took all personal property, tools, machinery, &c., in the ax factory, and all iron, steel, stock and materials for being manufactured, and all axes and other edged tools, manufactured or in process of being manufactured, and stock partly manufactured, and all manufactured articles in the hands of commission merchants or other dealers, &c., &c. If none had been sold by White, then all the steel was on hand in bars, manufactured, in process of manufacture, or in the hands of dealers. The plaintiffs gave all the evidence as to the possession of the property by the assignees which the nature of the case admitted of, and it was in the power of the defendants to prove beyond all doubt how much of it passed to them under the assignment. And failing to give any proof, I think the jury were justified in presuming that all the property purchased of the plaintiff passed to the assignees. I am of opinion,

therefore, that the branch of the charge under consideration was right.

The only remaining question is, whether the question put to White, as to whether, when he purchased the steel, he intended to pay for it, was properly excluded. I think it was, for two reasons, viz: 1. The inquiry is only competent when the intention of the witness at the time, and in relation to the subject matter of the inquiry, is material. Seymour *v.* Wilson, 14 *N. Y.* 567; Griffin *v.* Marquardt, 21 *Id.* 121; Forbes *v.* Waller, 25 *Id.* 433. There was no fraud imputed to White in making the sale, nor was there any issue in the pleadings as to a fraudulent intent, and hence a case was not made that rendered it either proper or necessary to inquire into White's intentions when he made the purchase. 2. White denied ever having made any contract with the plaintiffs' agents for the purchase of the steel. He says he talked with them about purchasing more than one box, but no agreement was made in relation to them, and he did not know that the plaintiffs' agents contemptated sending forward more than the single box until he was informed by his teamster that ten boxes were at Troy. Then, for the first time, did he assent to take the additional boxes. Whether he had intention not to pay for property forced upon him, as he insists, by the plaintiffs' agents, could not be material, and the inquiry was properly excluded.

The result of my examination of this case is, that the order as to Miller and White must be reversed, and that as to the defendant Ferguson, it should be affirmed, and judgment absolute under the stipulation, in favor of Ferguson against the plaintiffs.

A majority of the judges concurred.

Judgment accordingly, with costs.

JETTER *v.* THE NEW YORK AND HARLEM RAILROAD COMPANY.

December, 1865.

The question of negligence on the part of an attendant, upon the street, of a child six years old, in allowing the child to run in advance when the street was reasonably clear of vehicles and other causes of danger, is one for the jury.*

Where an injury is caused to a passer-by by a defect in a railroad car, the company using the car at the time cannot escape liability by showing that the car was owned by and borrowed from another company.

In doing a lawful act where there are no present appearances of danger every man has a right to assume that others will perform their duty and obey the law, and not bring injury upon him by its violation.†

A person violating a public ordinance is a wrongdoer, and is necessarily negligent, and an innocent person injured by the illegal act is entitled to a civil remedy therefor ‡

Philip J. Jetter sued the New York & Harlem Railroad Company, in the New York common pleas, to recover for loss of services, and for his expenses, &c., occasioned by an injury to his child, which was struck and run over by a car on defendant's track, while crossing a street in the city of New York.

The child was about six years of age, deaf, and partly dumb. The car was driven at full speed of the horses, out of the depot and around a curve of the track into the center of the street. The child, who was accompanied on the street by an adult servant, was knocked down and severely injured.

The plaintiff, among other evidence, offered the city ordinance restricting the rate of speed of vehicles in the streets. At the close of plaintiff's evidence, and again at the close of their own evidence, defendants asked for a nonsuit on the ground that the negligence was wholly on plaintiff's part. This the court refused. By defendants' evidence it appeared that the car be-

* Compare Honegsberger v. Second Ave. R. R. Co., p. 373 of this vol., and cases cited in note.

† S. P. Newson v. N. Y. Central R. R. Co., 29 *N. Y.* 383.

‡ Followed in Beisigel v. N. Y. Central R. R. Co., *Ct. of App.*, Decem., 1870, 14 *Abb. Pr. N. S.* 30.

longed to the New Haven R. R. Co. There was also testimony which plaintiff insisted showed that the brakes were insufficient. Other details appear in the opinion.

Defendants requested the court to charge the jury, 1, that it was negligence on plaintiff's part, to permit the child, suffering under such a deprivation, to be in the street without protection; 2, that defendants were not liable for any defect in the car or brake; and lastly, that the burden of proof of negligence was on plaintiff, and if there was any defect in the evidence of plaintiff to prove negligence of defendants, he could not recover.

The court, among other things, charged the jury that "plaintiff's right to recover depends on whether he has satisfactorily established that the child was injured through the negligence of the defendants or of their servants, and also, that there was no neglect on his part, or which is the same thing, that there was no neglect of the child, directly contributing to the injury." The material parts of the charge appear more fully in the opinion.

The defendants excepted to the refusal to charge otherwise than as stated; and the plaintiff had a verdict of one thousand dollars.

The common pleas, at general term, affirmed the judgment entered thereon. The defendants appealed.

Charles W. Sandford, for defendants, appellants.

Tomlinson & Brigham, attorneys for plaintiff, respondent.

By the Court.—Davis, J.—I think there was no error in denying the motion for nonsuit. The evidence on the part of the plaintiff tended strongly to show negligence in the management of the car; and, if his witnesses were entitled to credit, the servants of the defendants were not only violating the ordinance of the city, but, in turning the curve into Canal-street at the speed described, were committing an act most likely to result in injuries to persons using the street. The conflicting evidence on this subject, as well as upon several other questions, made the fact whether the injury was caused

by negligence on the part of defendants one not only fit to be submitted to the jury, but which exclusively belonged to them under suitable instructions from the court. Nor do I think the evidence showed such want of care on the part of the child or her attendant as could have been properly declared by the court to have been negligence contributing to produce the injury. The child was of tender years and afflicted with infirmities that greatly added to the attention she required, but it appeared that she was sprightly and intelligent notwithstanding her affliction, and accustomed "to go of errands for her mother," and to some extent was familiar with the streets. The evidence showed that she was accompanied by a woman of mature years, who walked with and near her; that, as they came to the crossing, the child ran a little in advance of the woman, who was following her across the street; but, as plaintiff's witness testified, there was nothing whatever to indicate that there was any danger in this act. The street, as they swore, was wholly free from vehicles, and the car which injured her was not in sight. As a question of law, I am not prepared to say, under the circumstances, that it was the duty of the attendant to have kept the child constantly under her hand. The degree of care was dependent upon the circumstances of danger; and in the absence of vehicles upon the street, and with no car in sight, nor aught to indicate that a separation of a few steps between the woman and the child exposed the latter to injury, it would be a severe ruling that would take the question of plaintiff's negligence from the consideration of a jury. Men of ordinary care and prudence would have felt free, assuming the circumstances detailed by plaintiff's witnesses to be true, to have crossed the street without apprehension of danger; and this child and its companion are to be held to no higher obligation of vigilance. A person of extreme caution might have carried the child over; another of less caution might have clung to her with tenacity; and yet an ordinarily prudent person, seeing the street clear on either hand, might have suffered a child to have skipped along in advance in its natural playfulness, without reason to suspect any exposure to injury. In Johnson *v.* Hudson River R. R. Co., 20 *N. Y.* 65, Mr. Justice DENIO discussed the subject of the evidence of plaintiff's negli-

gence contributing to an injury so as to defeat his action, with the philosophic discrimination that distinguishes that eminent jurist, and to his views I do not hesitate to bring the humble tribute of my hearty assent. I do not mean to assert that the question of negligence on the part of plaintiff was, in this case, free from doubt, nor even to declare that the jury have, beyond question, passed upon it correctly; but what I mean to say is, that it was properly a question of fact for the jury to consider, and not of law for the court to adjudicate.

The exceptions to the refusals to charge were none of them well taken. The first request was not predicated of any of the facts in the case; for the child was not suffered "to be in the street without protection." She was constantly attended by the person in charge of her, and only temporarily separated while the child ran in advance along the cross-walk. The facts on this point were fairly put to the jury by the court.

The second request was based upon the fact that the car belonged to the New York and New Haven Railroad Company. and not to defendant. But it was of no importance to whom it belonged. The party assuming to use it was responsible for its fitness to the use to which it was put. If the brakes were defective, the defendants were legally chargeable with any consequences that resulted from such defect while they were using the car for their own purposes.

The fourth request was sufficiently charged.

Nor do I think any of the exceptions to the charge are well taken. The charge was careful, well considered and impartial. The learned judge first laid down the general rule of law on which the plaintiff's right to maintain the action depended, to wit, that "he must satisfactorily establish that the child was injured through the negligence of the defendants or their servants, and that there was no neglect on his part, or, which is the same thing, that there was no neglect of the child directly contributing to the injury;" and again, at the close of the charge, he recalled the attention of the jury to what he had said "respecting the plaintiff's being required to show himself wholly free from neglect."

After referring to the evidence tending to show that the street was clear of vehicles and that no car was in sight, the

judge said that, "*under such circumstances*, a person about crossing the street having in charge a child of tender years, has a right to take into consideration the fact, that by the city ordinances no vehicle is permitted to turn a corner faster than a walk, nor to travel upon a street at a faster rate than six miles an hour, and if, upon a proper calculation then made, the street can be crossed before any vehicle traveling at this rate can come upon them, it is not negligence to permit the child to cross by itself without the immediate protection which the law would otherwise require to enable a party to recover in a case of this kind, where the injury occurred in a street with many vehicles moving upon it at the time." To this the defendants' counsel excepted. The substance of this part of the charge is nothing more than an assertion that a party who is doing a lawful act where there is no present danger or appearances to indicate its approach, has a right to assume that others will conform their conduct to the express requirements of the law, and not bring injury upon him by its violation; and that the care demanded of a party in such a case would not be the same as where the danger was present and apparent. I see no want of good sense or of sound law in this proposition. Every person traversing the streets of the city of New York has a right to feel that its municipal laws are to some extent a protection to his person through the obedience they exact and will receive from others. And though he has no right to place a blind reliance on such obedience and put himself in positions of danger, regardless of personal risk, yet, where no danger is manifest, and none can arise without a violation of an ordinance, it is not negligence to assume that nobody will bring it upon him by a breach of the ordinance. In short, in the exercise of his lawful rights, every man has a right to act on the belief that every other person will perform his duty and obey the law.

The exception "to that part of the charge which held the defendants liable for any insufficiency of the brakes or other apparatus of the New Haven car," was aimed at and only reaches the question of the ownership of the car. Enough has already been said on the point of the liability of the defendants for the defectiveness of a car in their actual use, though not in fact belonging to them.

Railroad companies cannot escape responsibility for using defective carriages by borrowing them from one another.

While commenting on the consequences of the car being equipped with insufficient brakes, the learned judge added: "And in considering this question, it may not be amiss to bear in mind the evidence of those witnesses who testify to the rate of speed at which the car turned the corner of the street or alley-way before coming into Canal street, and the kind of brakes necessarily required to control a car going at the rate shown; and if, on examining the conflicting testimony upon this point, you come to the conclusion that the car came round the corner with the horses on the jump, as some have said, instead of on a walk as the city ordinances require corners to be turned, and that this movement was so sudden that the woman and child, exercising the caution that the law imposes upon all persons of mature years traveling upon the highway, did not see the danger until to late to avoid it, the defendants are liable, because in such a case, the accident would be the result of their violating the ordinances of the city, and any person has a right, in traveling upon the street, to assume that other persons will travel only at the speed and in the manner pointed out by the ordinances." To this part of the charge the defendants excepted. I think the proposition of this charge was entirely sound, although it seems at first blush to be in conflict with the rule laid down in Brown *v.* Buffalo & State Line R. R. Co., 22 *N. Y.* 191.

In that case, the defendants were running a train of cars in direct violation of a city ordinance which affixed a penalty of one hundred and fifty dollars for the act. The judge charged that if plaintiff was free from fault or negligence contributing to the injury, and the jury found that the injury was occasioned by, or would not have occurred but for, such violation of the ordinance, the defendant was liable. The court (with three dissenting judges) held, that this was error, because the penalty affixed by the ordinance was the only consequence which the law imposed for its violation.

That case stands upon ground altogether to doubtful to justify its application to cases not strictly within it. The opinion confounds all distinction between civil remedies and criminal

punishments, and the authorities cited by it go no further than to hold that, where a specific penalty is prescribed by a law forbidding an act not *per se* criminal, the act *is not otherwise punishable as a public offense.* It failed to recognize the axiomatic truth that every person while violating an express statute is a wrong-doer, and, as such, is *ex necessitate* negligent in the eye of the law, and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have. It ignores, also, the principle above asserted, that every person pursuing his lawful affairs in a lawful way has a right to assume, and act upon the assumption, that every other person will do the same thing.

But this case is distinguishable from the one cited, in the important particular that it does not appear in the case that any penalty was affixed to the ordinance, or that it is otherwise than a general prohibition, the violation of which is punishable as a misdemeanor. It was only because it appeared in Brown's case that the public were entitled to a specific penalty of one hundred and fifty dollars for the forbidden act that it was held that a private citizen, whose person was injured by that act had no redress on the ground of its unlawfulness, and it seemed to be conceded that had the public remedy been general, instead of the particular one prescribed by the ordinance, the party injured by the criminal act would have had some claim to a civil remedy.

Besides, the part now objected to was a portion of the charge relative to the liability for using deficient brakes, and it will bear the construction, though, perhaps, it is a strained one, that the substance was that defendants would be guilty of negligence in running their cars, in violation of a city ordinance, around a corner on a jump instead of on a walk, with brakes insufficient to prevent a collision with passers on the street who were themselves free from negligence. So construed, the charge would not be obnoxious to any of the views expressed in Brown v. Buffalo & Scott Line R. R. Co., *supra*, for, if that case holds that any one who will pay the pecuniary penalty may violate the statute which imposes it, with civil impunity, it certainly enjoins that he shall not violate it in a negligent manner. If

his brakes are out of order, so that he cannot stop the breach of the law in time to prevent a personal injury to his neighbor, he is, for that reason, responsible to him for his damages. While, individually, I do not concede that the violator of a city ordinance can escape civil responsibility for an injury to another, which he inflicts by the offense, by showing that he committed the act with care and skill, and due precaution to a perfection of equipment and means, yet I am bound to concede that, in the absence of those attributes, the case is a clear one against him.

In my opinion, the judgment below ought to be affirmed.

All the judges concurred, except CAMPBELL, J., who dissented.

Judgment affirmed.

JOHNSON *v.* HATHORN.

June, 1866.

Defendant having agreed to transfer to plaintiff full paid stock, fraudulently induced him to accept stock that was, on its face, but half paid, with a deceptive and ineffectual guaranty. *Held*, that he was liable therefor in an action for deceit.*

One who uses words in a deceptive and double sense, for the purpose of deceit, is bound by them in the sense in which he used them.

Where plaintiff alleges facts entitling him both to legal and equitable relief, and demands both, the court may award either that is appropriate to the case made by the proof.

Henry Johnson sued Rowland P. Cooley (for whom, on his death pending the action, Henry H. Hathorn, his executor, was substituted as defendant), for deceit in an exchange of property.

Johnson owned a house and lot, which he offered for sale. Cooley called on him and negotiated for its purchase. Johnson's price was six thousand dollars. Cooley offered five thousand dollars in the stock of the Mutual Bank of Castleton,

* See Barker v. Bradley, 42 *N. Y.* 319.

Vermont, and five hundred and twenty-five dollars in cash. This offer was made and accepted orally. Pursuant to it, Johnson gave a deed of his property and surrendered possession, and Cooley gave him his covenant to transfer five thousand dollars of the capital stock of the bank, then standing in Cooley's name, and this covenant contained a guarantee that the amount of capital stock of the bank *on which it commenced business* was paid in and unimpaired. Cooley paid enough in cash, to amount, with the accrued dividends, to the five hundred and twenty-five dollars additional. When Cooley came to deliver the stock, it appeared by the face of the certificates that it was subject to the payment of fifty dollars per share; in other words, was only half paid.

To induce Johnson to accept this, notwithstanding, Cooley drew and delivered to him a covenant, "to indemnify and save harmless the said Johnson from any liability to be called on to pay any further installment for capital stock in, &c., . . . and in the contingency that the officers of said bank should hereafter declare an installment and order it paid in, with intent to increase the capital stock thereof, and the said Johnson should neglect or refuse to pay such installment, the intent and meaning of this instrument is to be, on reasonable notice given, to indemnify and save harmless the said Henry Johnson from refusing or neglecting so to do." This covenant was given April 12, 1860.

In August, 1861, plaintiff (who had meanwhile been absent in California), commenced this action, in which he alleged these facts (averring, however, that the agreement to exchange was in writing): and that he supposed, and defendant knew that he supposed, in agreeing to take the stock, that it was full paid stock, and that defendant intended to, and did thereby, defraud him.

The relief demanded by the complaint was, judgment for the two thousand five hundred dollars deficiency in the stock, and that the same be declared a lien on the house and lot, as part of the purchase money; and that the house and lot be sold therefor.

The defendant insisted that the agreement to exchange was void by the statute; that the half paid stock was accepted in

payment, and that the guaranty merged all prior understandings.

The judge found the substantial facts above stated, as to the exchange, the conveyance, the covenant to transfer the stock, and the guaranty, and the belief of plaintiff intentionally induced by defendant, that in receiving the scrip and guaranty he was receiving full paid stock to the amount of five thousand dollars; and that plaintiff would not have otherwise received it. He accordingly gave judgment for plaintiff for the sum claimed, with interest, but did not adjudge it a lien on the property sold.

The supreme court, at general term, affirmed the judgment. They held, among other things, that the objection that the judgment was for legal relief merely, under a complaint asking for equitable relief, was untenable; for fraud and damages entitle to relief in *any* court, and the judgment could not be reversed because of the form of the action, if justice had been done. Also, they held, that the fraud in the guaranty vitiated it, and prevented the application of the rules that parol evidence was not admissible to explain a writing, and that a later agreement merges a prior one on the same subject. They accordingly affirmed the judgment. Defendant appealed; and the main questions were, whether the frame of the action allowed the recovery of damages, and whether a false affirmation, as to the contents or effect of a written instrument which is open to the party, will sustain an action. See Starr *v.* Bennett, 5 *Hill*, 306; Jarvis *v.* Palmer, 11 *Paige*, 630; 29 *Barb.* 595; 9 *Id.* 532; 9 *Conn.* 96.

A. Pond, attorney for defendant, appellant.

W. A. Beach, for plaintiff, respondent.

By the Court.—Porter, J.—On the facts found by the judge the plaintiff was entitled to judgment. The original agreement for the sale of the property was not in writing, but it was performed by the plaintiff when he executed the conveyance, and the defendant, who took the benefit of the contract

was bound to fulfill it on his part. Thomas *v.* Dickinson, 12 *N. Y.* (2 *Kern.*) 364. He agreed to pay five thousand five hundred and twenty-five dollars as the price, and two thousand five hundred dollars of this amount has neither been paid by him nor released by the plaintiff. Five thousand dollars of the purchase money was to have been paid in stock of the Mutual Bank of Castleton. He paid half the amount in that stock, and the delivery and acceptance of this scrip reduced *pro tanto* the amount of his liability, but did not extinguish it as to the residue.

At the time the conveyance was executed and delivered, he was not prepared to transfer the stock as he had agreed; he induced the plaintiff to accept a covenant, the purpose of which, on his part, evidently was to merge the original agreement under the pretense of fulfilling it, and by this device to defraud the plaintiff of two thousand five hundred dollars of the purchase money. To this end he gave the plaintiff to understand, as well at the time of the original agreement as at each of the subsequent transactions, that the scrip he was to receive represented, in fact, full paid stock to the amount of five thousand dollars; and this he knew to be false. He afterwards induced him, by the same fraudulent means, to surrender this covenant on receiving a certificate, nominally for fifty shares of one hundred dollars each, but really representing only half that amount of stock.

If the liability of the defendant depended on his written consent, he would still be responsible for the remaining two thousand five hundred dollars of stock. In that instrument he agreed to transfer to the plaintiff five thousand dollars of the stock of the Mutual Bank, and this agreement he has only in part performed. He can derive no aid from the adroit and slippery language of the subjoined guaranty. One who uses words in a deceptive and double sense, for the purpose of misleading the party with whom he contracts, is bound by them in the sense in which he intended they should be understood. Hoffman *v.* Ætna Ins. Co., 32 *N. Y.* 405; Barlow *v.* Scott, 24 *Id.* 40; Mowatt *v.* Lord Londesborough, 3 *Ell. & B.* 334, 367; S. C., 25 *Eng. L. & Eq.* 25; and see 4 *Ell. & B.* 1.

The surrender of the covenant, having been procured by the

fraud of the defendant, cannot shield him from liability. It is true that the terms of the stock certificate put the plaintiff upon inquiry; but he made the inquiry promptly, and the defendant, knowing the truth, deceived him. Mead *v.* Bunn, 32 *N. Y.* 275; Williamson *v.* Brown, 15 *Id.* 354; Sharp *v.* Mayor, &c. of N. Y., 25 *How. Pr.* 389, 390; Bradley *v.* Bosley, 1 *Barb. Ch.* 125; Cooke *v.* Nathan, 16 *Barb.* 342.

But there was no merger of the parol agreement to pay the stipulated price. The subsequent writings, signed by the defendant, neither superseded nor extinugished his previous undertaking; and oral evidence was properly received to show the terms of the unwritten contract, and to expose and defeat the fraud attempted to be practiced by means of these writings, under color of carrying out his original engagement. Hutchins *v.* Hebbard, 34 *N. Y.* 24; Bradley *v.* Bosley, 1 *Barb. Ch.* 125, 152; Johnson *v.* Miln, 14 *Wend.* 195; Morris *v.* Whitcher, 20 *N. Y.* 41.

Upon the state of facts established by the proof and found by the judge, the motion to dismiss the complaint was properly denied. We have no authority to reverse the judgment, by reason of defects in the pleadings, which did not affect the substantial rights of the defendant. *Code of Pro.* §§ 11, 169. The averment in the complaint that the original agreement was in writing was not sustained by the proof; but we are bound to treat the variance as immaterial, in the absence of affirmative evidence that it misled the adverse party. *Code of Pro.* § 169. The gravamen of the allegation was, that such an agreement was made, and the question whether it was written or oral was unimportant, except so far as it affected the mode of proof. The judge was therefore at liberty, without directing an amendment, to find the facts in accordance with the evidence. *Code of Pro.* § 171. The findings were within the scope of the allegations, and there was no failure of proof within the meaning of the Code.

Upon the facts alleged, the plaintiff was entitled to equitable as well as legal relief; and, as he demanded both, the judge was right in awarding that which seemed appropriate to the case made by the proof. Emery *v.* Pease, 20 *N. Y.* 62, 64;

Bedford *v.* Terhune, 27 *How. Pr.* 422; Lounsbury *v.* Purdy, 18 *N. Y.* 515; Byxbie *v.* Wood, 24 *Id.* 607.

Other exceptions were taken on the trial which it is not material to discuss, as they are all plainly untenable. The cause was well tried, and the judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs, and ten per cent. damages.

JOHNSON *v.* MONELL.

September, 1866.

The mere omission of one purchasing goods on credit, to disclose the fact that he is insolvent and unable to pay, is sufficient, without any affirmative representation, to render the purchase fraudulent and the sale void.

Wallace Johnson sued Henry Monell and Henry B. Crampton in the supreme court, to recover possession of merchandise, which he alleged that the firm of Warner & Co. procured from him by false representations, upon credit, and then, being insolvent, transferred to the defendants by a general assignment in trust for the benefit of creditors. The facts appearing on the trial, some details of which are mentioned more fully in the opinion of MORGAN, J., were, in brief, that on December 27, 1859, Warner & Co. addressed a letter to the plaintiff, asking him his lowest price for two hundred bushels of seed, to which the plaintiff replied, making an offer, and requesting acceptance by telegraph. Warner & Co. responded by telegraph, accepting the offer, on the 29th of December. The terms of payment were not specified in this correspondence. The seed was forwarded by plaintiff on the day that the telegram was sent.

Plaintiff testified on the trial that he had done business with Warner & Co. for about four years, and had shipped goods in the same way on correspondence, and generally got pay on their receipt; though, in some few instances, a few days elapsed before they sent the money. Plaintiff was allowed, against the

objection and exception of defendants, to testify that the general usage when goods were shipped in that way, with reference to payment, was to pay cash after a sufficient time had elapsed to inspect the goods.

On January 4, 1860, Warner & Co. executed an assignment for benefit of creditors, they then being hopelessly insolvent.

In response to a motion for a nonsuit at the close of plaintiff's evidence, the judge ruled that whether there was a fraudulent intent on the part of Warner & Co. at the time of buying the seed, not to pay for it, was a question of fact for the jury. To this exception was taken.

Warner, of the firm of Warner & Co., being called as a witness for defendants, testified that the firm, stopped payment on the evening of January 4, because drafts they had drawn on Bierce of New York for five or six thousand dollars had not been honored. That they drew checks on the 3rd for considerable amounts, and on the 4th overdrew their bank account; that they did not conclude to stop payment until the 4th.

The judge refused defendant's renewed request for a nonsuit, upon the same ground as before, and instructed the jury that if they should find that Warner & Co., with knowledge of their insolvency, and having in contemplation the making of the assignment, purchased the property with the intent not to pay for it, they were guilty of a fraud which would avoid the contract, and title did not pass; and that if they were so insolvent at the time of the purchase, and knew themselves to be so, and were intending to make the assignment, it was evidence of a fraudulent intent on their part not to disclose to the plaintiff their insolvency at the time of the purchase; that if they did not intend to pay for the property, and did intend to cheat the plaintiff out of the price, this alone would make the sale fraudulent and void, although they resorted to no act or contrivance to mislead the plaintiff.

The judge refused to comply with defendant's request to charge the jury that the mere intent to get the property without paying for it, manifested by no fraudulent acts, words or declarations, would not avoid the sale. To this refusal exception was taken.

The jury rendered a verdict for plaintiff against one of the defendants (no demand having been proved to have been made on the other), and the supreme court, at general term, affirmed the judgment entered on the verdict, without assigning their reasons.

John H. Reynolds and *N. A. Woodward*, for defendant, respondent.—The question as to what was the usage in regard to payment, when goods were shipped as these were, was improper, since, 1. It calls for an opinion from one not an expert. 2. It assumes there is a general usage where none has been shown. "A local usage cannot be given effect to vary a contract." 7 *Hill*, 497; Vail *v.* Rice, 5 *N. Y.* 155. The nonsuit should have been granted. Lupin *v.* Marie, 6 *Wend.* 77; Conger *v.* Ennis, 2 *Mass.* 236; Mitchell *v.* Worden, 20 *Barb.* 253; Nichols *v.* Pinner, 18 *N. Y.* 295; Hennequin v. Naylor, 24 *N. Y.* 139. The charge of the judge that the intent not to pay for the goods would make the sale fraudulent, although no act or contrivance were resorted to for the purpose of misleading, was erroneous. Cases cited above, and Smith *v.* Smith, 21 *Penn.* 367; Fisher *v.* Conant, 3 *E. D. Smith*, 199; 2 *Pars. on Contr.* 270, 266; Ward *v.* Woodburn, 27 *Barb.* 346; George *v.* Parker, 25 *Id.* 141.

H. C. Day, for plaintiff, respondent.—The charge of the judge was correct, and the verdict was sustained by the evidence. Nichols *v.* Pinner, 18 *N. Y.* 295; Nichols *v* Michael, 23 *Id.* 264; Hennequin *v.* Naylor, 24 *Id.* 139.

MORGAN, J.—The case does not disclose all the circumstances which it is material to know in order to form a satisfactory opinion upon the main question involved in the defendant's exceptions. All we know is, that Warner & Co. ordered the goods on December 29, 1859, and on January 4 thereafter, executed a carefully prepared assignment, containing forty-three folios; and that all the parties, residing at different places, were got together the same day to execute it; that they stopped payment on that day, and acknowledged themselves to be insolvent.

Several other facts were proved, but not of a decisive char-

acter. The fact that Warner & Co. drew checks on the 3rd to pay a considerable amount of indebtedness; that they overdrew their bank account on the 4th, and stopped payment on that day, because they had just learned that their drafts on Bierce, of New York, for five thousand dollars or six thousand dollars, had not been honored, are of no particular importance, and furnish no satisfactory evidence that they did not suppose themselves insolvent prior to that time, and contemplated making an assignment. It would have been a fact of great, and perhaps decisive, importance, if they had been able to show that they had funds in the hands of Bierce, which gave them a right to expect payment of their drafts, by the aid of which they could have avoided a suspension of payments. It may be a question of difficulty to determine whether it was the duty of the plaintiff or defendant to obtain this information from the witness. I do not see why the fact was not proved one way or the other. I think, however, it is the misfortune of the defendant, for it was for him to show the reasons which justified the failure of the firm on that day—reasons that did not exist on December 29, when they ordered the goods. Nothing appears to have occurred between December 29 and January 4, to change the pecuniary responsibility of the firm, except the dishonor of the Bierce drafts; and yet, we have no knowledge that the firm had funds in his hands, or that they expected the drafts to be paid when they were drawn.

In my opinion, it was for the defendants to account for the failure of the firm of Warner & Co., and to show that it was consistent with an honest intention to pay for the goods in question when they purchased them. If we lay these (Bierce's) drafts out of the case (which are not explained in the evidence), there is nothing else which even tends to prove that the firm of Warner & Co. were not hopelessly insolvent on December 29. It may be said that Warner did not know it when he ordered the goods of the plaintiff; but I am of opinion that knowledge may be presumed in such a case. Every man may be presumed to have some general knowledge of his pecuniary condition. If unforeseen circumstances arise, which change his situation, he is the proper party to explain them. In the absence of satisfactory explanations, it is not a violent pre-

sumption to infer that a man who stops payment to-day, because he is hopelessly insolvent, must have known and contemplated it six days before.

I am also of opinion that it was proper to prove the usage or course of dealings between the parties. It shows that the plaintiff had a right to place some confidence in the pecuniary responsibility of Warner & Co. Whether the plaintiff contemplated giving a short credit, or whether, by the former course of dealings, he had a right to expect payment on delivery of the goods, does not seem to me to be at all material. In either case the question of fraud would depend upon the *intention* of the defendant's assignors; whether, knowing their insolvency, they purchased the property with the preconceived design of not paying for it.

I do not understand that the question objected to called for the general usage of business between other parties; and as far as it related to the former transactions between these parties, I think the evidence was unobjectionable. If it did not prove that a cash sale was intended, it tended to prove that a short credit only was within the contemplation of the parties. Looking at their former dealings, I think Warner & Co. understood that the plaintiff would deliver the goods without exacting payment on delivery; and their offer to accept a draft at one day's sight, or to send him the funds the first of the next week, was well calculated to put the plaintiff at ease and enable Warner & Co. to complete their arrangements to make a general assignment, if such a thing was then in contemplation.

It will be seen that the judge left it as a question of fact for the jury to decide, whether Warner & Co., knowing of their insolvency, made the purchase with a preconceived design of not paying for the property. This, I think, was correct as a legal proposition; but the question remains, whether there was sufficient *prima facie* evidence of fraud to authorize its submission to the jury. It was claimed by the defendant's counsel that a design of this character may exist without fraud, and hence he requested the judge to charge the jury, that, if such a design was manifested by no fraudulent acts, words or declaration, it would not avoid the sale. The judge, however, instead of denying the proposition in the abstract, informed

the jury that they were to consider the question in connection with all the facts and evidence in the case.

I am of the opinion that the judge was not called upon either to affirm or deny the defendant's proposition. It was mere theory and speculation, without any practical value when addressed to the jury. Unless the evidence furnished grounds for presuming fraud, it was the duty of the judge to have nonsuited the plaintiff. And this brings us back to the only question involved in the exceptions, and that is, whether there was sufficient evidence to authorize its submission to the jury, from which they would have a right to infer fraud on the part of Warner & Co. in the purchase of these goods.

1. Was there any evidence that they knew they were insolvent and unable to pay for the goods when they ordered them? I have already stated, that, in the absence of any satisfactory explanation of their failure on January 4, 1860, the jury had a right to presume that they were insolvent six days before, and that they must have known it.

2. Was there evidence tending to show that Warner & Co. *did not intend* to pay for the goods when they purchased them? This is doubtless the most difficult question to answer, and yet I think it was a question for the jury to decide under the circumstances of this case.

It cannot be said with propriety that a man who is insolvent, and expects to be obliged to stop payment and to make an assignment within a few days, believes that he can pay for a large bill of goods which he has just ordered, and upon which he expects to obtain a short credit. Indeed he has no right to order a bill of goods under such circumstances without disclosing his pecuniary condition.

Here it appeared that the firm of Warner & Co. had dealt with the plaintiff for four years or more, paying him promptly for goods ordered in the same way these were ordered. Just on the eve of stopping payment, on account of actual insolvency, they send another order, knowing or having reason to believe that they would not be able to pay for them. But, says the counsel, this is not so, for the firm stopped payment because their drafts on Bierce of New York were dishonored, which they did not know of on January 4. True, that is the

reason given by one of the members. Were the jury bound to believe this, without any evidence that the firm had funds in Bierce's hands? No reason is stated why Bierce dishonored their drafts. If he owed the firm that amount and had failed, it might satisfactorily account for the subsequent failure of Warner & Co. In the absence of any explanation to account for the dishonor of the drafts drawn by Warner & Co. on Bierce, the jury had a right, I think, to regard the reason given by Warner & Co. for their own failure as a mere pretext. It is said, however, that fraud must be proved and cannot be presumed. But it may be inferred from competent evidence; and, in the absence of a satisfactory explanation of the failure of Warner & Co. on Jan. 4, 1860, I think there was competent evidence that they were insolvent on Dec. 29, 1859, and that they knew it; and, under such circumstances, they had no right to order goods without any expectation of being able to pay for them at a future day. It is not enough to say that it was perhaps uncertain what day they would be obliged to stop payment. If they were insolvent and might be forced to stop any day, they cannot be permitted to say that they designed in good faith to pay for a large bill of goods ordered by them on December 29, and upon which they expected a short credit of three or four days at least, according to the usual course of dealings between the parties. They could not be indifferent in such a case, but the law will attribute to them a design not to pay unless they can show that they expected to be able to pay, and such expectation must be founded upon *data* which will satisfy the jury that it was honestly entertained.

3. It will not be necessary to refer to the authorities to show that the charge of the judge was a correct exposition of the law applicable to this class of cases. No doubt can be entertained upon this point. It is supposed, however, by the defendant's counsel, that, by the decisions of this court, an insolvent debtor may purchase goods without being guilty of fraud, if the vendor does not think proper to inquire into his circumstances; and that a mere omission of the insolvent debtor to disclose his insolvency is not evidence of fraud, which will operate to avoid the contract of sale. I am aware that such a doctrine has been enunciated in two or three cases; but on referring to the cases

themselves, it will be seen that it rests upon a very narrow foundation. In Nichols *v.* Pinner, 18 *N.Y.* 295, it was decided that the judge erred in refusing to instruct the jury that a merchant who is perhaps insolvent in April, may make an honest purchase of goods with the expectation of paying for them, although, contrary to his expectation, he is compelled to stop four months afterward. But, as was said by DENIO, J., in Brown *v.* Montgomery, 20 *N. Y.* 287, 293, "it does not countenance the position that a dealer who has been of known standing, but has suddenly failed in business, can go to those who were acquainted with his former character, but who have not heard of his failure, and innocently purchase their property on credit." So when it is shown that the insolvent purchaser made the purchase just on the eve of suspension and assignment, this fact alone, in the absence of explanatory proof, is sufficient to carry the case to the jury. Hennequin *v.* Naylor, 24 *N. Y.* 129, 139.

The question is, whether the purchaser made the purchase with a preconceived design not to pay for the goods. This is certainly the correct rule as between parties who have had former dealings together. Authorities are not wanting which hold that if the purchaser in such a case conceals the fact of his insolvency from the vendor, it is a fraud, and the property is not changed in the hands of the vendee. Durell *v.* Haley, 1 *Paige*, 492. If the purchaser knows himself to be insolvent, and has no reasonable expectation of paying for the goods, it is sufficient evidence of fraud to avoid the sale. Powell *v.* Bradlee, 9 *Gill & Johns.* 220; *Pars. on Contr.* 270, note *w*.

Every case must however depend in a great degree upon its own peculiar circumstances, and it is impossible to lay down strict rules which can be relied upon to solve future questions. In Nichols *v.* Pinner, the circumstances showed that Pinner made the purchase with an honest expectation of paying for the goods and retrieving his business. In Hennequin *v.* Naylor, there was no reason for any such expectation.

As a general rule, it must be left to the jury to say whether the purchaser, in such cases, honestly believed that he could pay for the goods. If he does not believe it, and purchases without disclosing his insolvency, I understand it is for the jury to determine whether the concealment was fraudulent or not.

Good faith towards those who have dealt with the purchaser upon the faith of his former good standing requires him to disclose his changed circumstances, if they are such as to justify a belief that he will be obliged to stop payment.

The true test is, not whether the vendee in such a case omitted to disclose his circumstances, but whether he honestly intended to pay for the goods at the time of the purchase. This is one question.

Another is, whether the vendee in such case was guilty of a fraudulent concealment, which is perhaps the same question in another form. If the purchaser does not intend to pay for the goods in such a case, his omission to disclose his insolvency would, I think, be evidence from which the jury must find a fraudulent concealment. But an embarrassed merchant may expect to retrieve his position, and may purchase goods with an honest intention to pay for them, founded upon reasonable expectations. In the latter case, it seems his omission to disclose his circumstances would not be fraudulent unless coupled with some deceit or artifice calculated to mislead the vendor, and throw him off his guard. This is all that was decided in Nichols *v.* Pinner; and it will be seen that it does not aid the defendant in the case at bar, where the purchase was made without any expectation on the part of Warner & Co. of being able to pay, so far as the evidence discloses their situation. Their failure and assignment within six days after their purchase, without any satisfactory explanation, was evidence to be submitted to the jury, from which an inference could be fairly drawn, that at the time of the purchase they had no reasonable expectation of being able to pay the plaintiff for the goods when called upon for that purpose. And if they had no reason to believe that they would be in a condition to pay for the goods when payment was called for, or afterward, the jury may infer that they intended to cheat and defraud the plaintiff out of the same.

The judgment should be affirmed.

PECKHAM, J.—The law of this case is settled, in my judgment, in Hennequin *v.* Naylor, 24 *N. Y.* 129, 139, if it were left doubtful by the case of Nichols *v.* Pinner, 18 *Id.* 295, and

23 *Id.* 264. The decision of the judge, in refusing the nonsuit, and his charge, are fully sustained by that case.

There is no principle that will sanction a fraud in the purchase of goods, although the fraudulent purchaser was enabled to contract for and obtain possession of them without any false statement to the vendor.

To my mind there seems to be an absurdity in holding that such false statement is the only evidence that can establish the fraud. That is the simple principle upon which alone such a decision can be based, and there is no such principle in the law.

To establish such a fraud a party is no more confined to any particular kind or character of evidence than he is in any other case. He must prove the fraud to the satisfaction of the jury, by any competent evidence, and if he fail to make out a case sufficient to go to the jury, without evidence of false representation at the time of the purchase, then he must give that evidence or be nonsuited.

To avoid the sale as fraudulent the jury must be satisfied, by the proof, that the purchaser intended, by the purchase, to defraud the vendor; that he never intended to pay for the goods. That proof will differ necesarily in practice as much as the conduct of men varies. To hold that affirmative misrepresentation is indispensable to avoid a sale is to declare that that is the only mode in which a fraudulent purchase can be made, that all others are honest and legal.

Take a case: A country merchant has traded in the city for many years, and by his uniform and prompt payments established a high credit. His city friends, after such experience, no more think of inquiring as to his pecuniary condition than they would of inquiring of their bank whether it would pay their checks when their account was good. Yet this merchant has been gradually running behind for a year or two. Finally, he decides to fail, and make money in that way; a large judgment is confessed or recovered; he tells the sheriff he has not sufficient assets then, but will have soon from New York; goes to New York and buys largely on his old credit, but affirmatively states no falsehoods; the goods are sent home and immediately levied upon, and he fails as he intended. Were these purchases

fair and legal? Did the sheriff get any title by his levy? Very clearly not, as I think we all agree.

In principle that does not differ from the case at bar.

Why did these purchasers stop payment, fail and assign? There is no pretense, in the evidence, that they had lost a dollar unexpectedly or otherwise; a house in New York had not honored their drafts for five or six thousand dollars; the house had not failed; these purchasers had lost nothing by them, so far as the evidence shows. They overdrew their bank account on the same day they made the assignment.

From its great length and the care with which it is stated to have been drawn, they must have been actually engaged in making their assignment at the time they overdrew their bank account. Instead of proving their credit, this simple fact unexplained proved another fraud committed, with confessed knowledge of their condition.

It is not necessary to refer more especially to the testimony; enough was shown, in our judgment, to make a case for the jury, and the charge was unobjectionable. The judgment should be affirmed.

All the judges concurred, except PORTER, J., not voting.

Judgment affirmed, with costs.

KELLER *v.* THE N. Y. CENTRAL R. R. CO.

June, 1861.

Affirming 17 *How. Pr.* 102.

An action lies, under the statute, by the personal representatives, to recover damages for injuries causing death, without proof of resulting damages to husband, widow, or next of kin of the deceased.*

In cases of negligence, if the facts are so clear and decided that the inference of negligence is irresistible, it is the duty of the judge to decide it; but when the facts, or the inference to be drawn from them,

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* See also Ihl *v.* Forty-seventh street R. R. Co., 47 *N. Y.* 317; Dickens *v.* N. Y. Central R. R. Co., vol. 1 of this series, p. 504.

are in any degree doubtful, the only proper rule is to submit the question to the jury, under proper instructions.*

The question whether a railroad train stopped an ample time for all the passengers to get off, calls for an opinion on a matter not involving skilled testimony, and is improper. So of the question whether it was safer to discharge passengers in a station or before reaching it.

Benjamin Keller, administrator of Rachel Keller, deceased, sued the defendants, in the supreme court, to recover damages under the statute (*L.* 1847, p. 575; *L.* 1849, p. 388), for injuries causing her death.

The deceased was a passenger on defendants' road, with her daughter, Sally Dickens. The train stopped at Canastota, a station on the road. There was evidence that the name of the station was called; but the deceased was not aware what station it was until the train was starting, when she got off, with her daughter. They alighted on the track south of the one on which their train was, and before they had got off the track, an express train, passing at full speed, killed them. The details, so far as material, appear in the opinion.

The deceased was a widow, and her only surviving next of kin were two sons, one married daughter (all of full age), and two children of a deceased son. The administrator, who brought this action, was one of the sons.

The main questions litigated were, as to the negligence of the defendants, and the contributory negligence of the deceased.

The jury found a verdict for plaintiff, for one thousand seven hundred dollars; and the court directed the exceptions to be heard, in the first instance, at general term.

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* The case in the text, although decided by a bare majority of the court, has been reaffirmed by the court as an authoritative opinion upon the proposition stated in the second head-note, which determined the main question in the case (Ernst *v.* Hudson River R. R. Co., 35 *N. Y.* 9, 39; S. C., 3 *Abb. Pr. N. S.* 33, 106; 32 *How. Pr.* 61), and has been followed by the other courts. Seabrook *v.* Hecker, 4 *Robt.* 344; Lamb *v.* Camden & Amb. Tr. Co. 2 *Daly*, 454, 467; reversed on another point in 46 *N. Y.* 271. Burke *v.* Broadway & Seventh Ave. R. R. Co., 49 *Barb.* 529. For cases involving the same or similar circumstances, see Dickens *v.* The same defendants, vol. 1 of this series, p. 504; and Gonzales *v.* N. Y. & Harlem R. R. Co., 38 *N. Y.* 440; 1 *Sweeny*, 506; 39 *How. Pr.* 407.

The supreme court, on the application at general term for a new trial, founded chiefly upon the ground that the intestate left no one who sustained any pecuniary loss by her death, held, on the authority of Quin *v.* Moore, 15 *N. Y.* 434, that the statute gave an action, not only where the decedent left some one who sustained the pecuniary loss, but in any case in which the injured person could have maintained it if he were living. Reported in 17 *How. Pr.* 102.

Judgment having been entered, the defendants appealed.

Morris S. Miller, attorney for defendants, appellants.

H. Link, attorney for plaintiff, respondent.

MASON, J.—The first question which I propose to consider in this case is, whether the judge at circuit was right in his refusal to grant the defendants' motion for a nonsuit.

The grounds taken by the counsel on that motion, or that the complaint be dismissed, are: 1, because no damages were proved as contemplated by the statute, neither to the husband, nor to the next of kin, nor are any alleged in the complaint; 2, because no negligence or wrongful act on the part of the defendants is proved, but the contrary; 3, because the undisputed evidence in the case shows positive carelessness on the part of the deceased, which contributed to the accident.

The case of Oldfield *v.* N. Y. & Harlem R. R. Co., 14 *N. Y.* (4 *Kern.*) 310, and the complaint in the action furnishes a complete answer to the first objection. That case decides that no proof of resulting damages in such an action is necessary to sustain it, and it is alleged in the complaint that the next of kin of Rachel, the intestate, suffered great loss and damage by means of her death.

There clearly was sufficient evidence upon the question of the defendants' negligence to submit the case to the jury. In the first place, it was negligence in the engineer of the express train to run his train past the station at the rate of thirty to forty miles an hour, when he knew that the mail train was at the station, discharging its passengers. In the second place, it was negligence in the conductor of the mail train to make so

short a stop at the station. He should have given more time, and seen to it that his passengers were safely discharged. At least he should have given them reasonable time. In the third place, the station should have been announced in the car where the deceased was. I know there is a conflict in the evidence, whether the station was announced in this car or not; that certainly belonged to the jury to decide, and we must assume it was found in favor of the plaintiff. In the fourth place, the defendants' servants, having in charge the mail train, knew that the express train was approaching at a rapid speed, and that there was great danger to be apprehended of injury to those who were to get off from their train, and they should have taken more precaution. The brakemen stationed to keep persons from getting off the south side were negligent in their duties, either in allowing these ladies to get off on that side, or in leaving their posts before the apprehended danger was past. It seems, that this danger was apprehended, and would have been guarded against if the brakemen had not been negligent in discharging their duty. The brakeman between the first and second car says, he knew the express train was coming, and kept his station on the south side of the platform, to prevent people getting off on that side. The deceased and her mother got off that platform on the south side, and yet this brakeman says he first saw them on the south track. He must have been asleep, or else not attending to his duties.

The question of negligence in all cases involves a question of fact; and it is only where the question of fact is free from all doubt, that the court has a right to apply the law without the action of the jury. Bernhardt *v.* Rens. & Sar. R. R. Co., 32 *Barb.* 165, 169.* When either the facts or the inference to be drawn from them are in any degree doubtful as to the question of negligence, it is the duty of the judge to submit the matter to the jury, under proper instructions as to the law. 32 *Barb.* 144. The rule upon this subject was well stated by Judge JOHNSON, speaking for this court in the case of Ireland *v.* Plank Road Co., 13 *N. Y.* (3 *Kern.*) 533, where he said: "It by no means follows, because there is no conflict in the testi-

* See affirmance, reported at p. 131 of vol. 1, of this series.

mony, that the court is to decide the issue as a question of law." He adds, "the question of negligence is very seldom established by such direct and positive evidence, that it can be taken from the jury and pronounced upon as matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances, disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference cannot be made without the intervention of the jury, although all the witnesses agree in their statements. Deductions from facts and circumstances, from their very nature, are not strictly subjects of legal science, like presumptions of law. What constitutes negligence in such cases is determined by an inference of the mind from the facts and circumstances of the case, and as minds are differently constituted, the inference from a given state of facts and circumstances will not always be the same. I admit the facts may be so clear and decided that this inference of negligence is irresistible, and in every such case it is the duty of the judge to decide; but when the facts, or the inference to be drawn from them, are *in any degree doubtful*, the only proper rule is to submit the whole matter to the jury, under proper instructions."

The case at bar is one in which the judge, at circuit, was clearly in the line of his duty in submitting the cause to the jury upon the question of the defendants' negligence. There were so many facts and circumstances, and such a variety of considerations to be taken into account in determining the question, the facts in regard to some of which being also in dispute, that the judge was right in leaving the inference or conclusion to be deduced from them to the jury; the facts were not so clear and decided that the inference was irresistible. My own opinion upon the trial was, that a case of negligence was proved, and if the duty had devolved upon me to decide, I should have so found. It is hardly a ground for interference with this judgment that another judge, sitting in this court in review, comes to a different conclusion upon this question. The question to be determined in such a case, is solved by the inference which the mind draws from the facts and circum-

stances of the case; and as minds are differently constituted, the inference from a given state of facts and circumstances will not always be the same. Here, then, we have a case which it is the province of the jury to decide. It would have been an error in the judge at circuit if he had refused to submit this case to the jury upon this question of negligence.

The remarks above made as to the submission of the question of the defendants' negligence, apply equally to the question of the negligence of the deceased. The negligence of the party which will defeat his action in such cases, is nothing more than want of proper care; and this question is always more or less affected by the conduct of the opposing party. It is not always negligence to cross a railroad track. If the crossing is at a time when no train is due and cannot be reasonably expected to pass, it is not negligence.* The passengers in this mail train had no reason to apprehend or expect that the express train would pass them at that station. Their time-table required them to pass each other two and a half miles west of Canastota, and such was their almost invariable custom. Mr. Toby, who kept the railroad house there, says that the trains do not usually meet there, and he did not know as they had that season. It was a thing unusual, and it seemed to have alarmed the conductor of the mail train; and Rose, the ticket and freight agent, seemed alarmed that the express train was to pass while the mail train was receiving and discharging its passengers. The flagman, Weldon, says he was so flustrated and confused, he could not tell how long the mail train did stop. It was an occurrence that seemed to have alarmed Mr. Toby, who was familiar with all the dangers to be apprehended, and he was on the alert. Rose, the ticket agent, gave special instruction to the flagman. He sent Reese, the baggage-man, around the south side of the mail train, to see that no one got on the south track. These two brakemen, Reals and Waterbury, saw the express train coming, and seemed fully to appreciate the danger. They voluntarily, without any directions,

* In reference to the obligation to look and listen for an approaching train, which is imposed on *passers by*, compare Beisigel *v.* N. Y. Central R. R. Co., 40 *N. Y.* 9, and cases cited; Hackford *v.* The same, 18 *Abb. Pr. N. S.* 18, and note.

placed themselves on the south side of the platform of their cars, to prevent persons getting off on that side; and Waterbury says he showed persons off the north side until he saw Miss White—who had got off on the north side—was passing around behind the cars to cross the track, and seeing her danger, he started for her; but fortunately, Mr. Toby saw her, and running after her, caught hold of her, and drew her back when within three feet of the south track; "and that instant," says Mr. Toby, "the express train came." The sequel demonstrated that these persons were not unnecessarily agitated in regard to the apprehended danger from the express train. If the deceased and her daughter knew that the express train was coming, it would have been a mere piece of recklessness in them to have got off on the south side. They did not know it, and therefore, had no reason to apprehend it; and certainly the deceased was no more negligent in getting off the train on this side than on the other side, had not the express train been running in. The ground was smooth and hard where they got off, and there was a space between the north and south track, of over seven feet in width, where the passengers land who get off the down trains from the south track. It may have been, and I am inclined to think it was, negligence in these ladies to get off while the train was in motion; and I think that we should hold that they assumed the risk of safely landing themselves from the cars. They did safely discharge themselves from the cars, and would have been all safe, but for the unexpected approach of the express train. It was certainly not unlawful for them to get off the south side, and they were not negligent in doing so, unless they had reason to expect a train to pass on the south track. Whether they were negligent or not depends upon the question whether they had reason to apprehend danger.

Now it seems to me, if they had been familiar with the locality and known the ground, they were not negligent in getting out on the south side; but these ladies were strangers there, and for aught that appears, were not aware that there was another track south of the one they were on. Was Miss White, the music teacher, negligent in attempting to cross the track at the time and in the manner she did? She had been accustomed to come upon this train, and cross the railroad to go to

her music class, and knew that she had no reason to expect any train from the west at that time. She was not careless, because she had no warning of danger, and yet she would, beyond doubt, have been killed, if Mr. Toby had not seized her and pulled her back just at the instant he did. And so young Fowler, who got off on the south side, would very likely have been killed, if Mr. Toby and the flagman had not warned him of his danger in time to make his escape. Were they negligent in attempting to cross the track after they were safely landed? This depends upon many circumstances. They certainly were in great danger to remain where they were. The engineer of the express train swore that it would be difficult to stand where they got off, between the trains, when the one was in full motion, although he thought it barely possible. Now, it does not appear from the evidence, when they first learned the approach of the express train, whether before or after they had started to cross the track; if after, then it were safer to keep on. It does not make much difference, I apprehend, whether it was before or afterward. If they saw it as soon as they got upon the ground, they can hardly be charged with negligence in their best attempts to escape danger. Here was the express train coming towards them at the rate of thirty to forty miles an hour. Here was in their reach the train from which they had just alighted, and there was no escape that way unless they got back upon that train which had been increasing its speed. This could not have been done probably if they had tried. There certainly could have been no question in regard to their negligence had they been killed in attempting to get back to the train from which they had just alighted. Had they stood still they would very probably have been killed. If they saw the whole of their danger after they landed, I am not prepared to say that the course they took was not the wisest. Had the mother but time to have taken one step more, and the daughter two, they both probably would have been saved. But they had no time to reason, and were undoubtedly greatly frightened, and if they did not exhibit sound judgment, or what we may think such, now in coolly looking the matter over, it is not such negligence as will deprive them of this action. It is not negligence when a person uses his faculties the best he

is capable of under the circumstances. They were not negligent in remaining in the car as long as they did, unless the station was announced, and there is a conflict in the evidence in regard to this question which belonged to the jury to determine. There is also considerable discrepancy in the testimony as to the speed with which the train was moving when they got off, and General Messanger says they had started with a slow motion, and others say that they were at the speed of from five to eight miles an hour, and then again, as to the time of the stop, the evidence varies from thirty seconds to two minutes.

From all these facts and circumstances to which I have adverted, and many others which are to be found in the case, the deduction of negligence or not is to be ascertained. It is an inference to be drawn from a pretty broad field of facts and circumstances, and which legitimately belonged to the jury. It was a fit case to submit to the jury. It was so submitted, and they have found, from their verdict, that the deceased was not negligent. The supreme court, who had the right and were asked to set aside this finding of the jury, by their refusal, have approved it. If there was nothing to submit, I think it will demonstrate that both the jury and an intelligent court, which reviewed their finding, committed a pretty gross blunder; the one in rendering a verdict, and the other in sustaining it. This court has no power either to approve or disapprove of the verdict: all this court can determine is, whether as matter of law there is any aspect in which the case can be considered, which would justify a verdict for the plaintiff; but the rule is, that if this rests in any degree of doubt, then the case must go the jury for their verdict. They hold in Connecticut that negligence is so peculiarly a question of fact, that it shall be left to the jury, even on a conceded state of facts. 19 *Conn.* 566; 2 *Smith & Bates' Am. Railway Cas.* 114. There was no error committed in leaving this question of negligence to the jury. The general proposition was submitted on the motion for a nonsuit that the evidence was not sufficient to entitle the plaintiff to recover, but it involved only the three propositions we have considered.

The point was also taken that the complaint did not state a cause of action; but the point is not made on this appeal, and

there is nothing in the proposition, and it is not necessary to consider it. The first two propositions of the defendant's counsel, in his request to charge, are settled by this court against the defendants in the case of Oldfield *v.* N. Y. & Harlem R. R. Co. 14 *N. Y.* (4 *Kern.*) 310. That case holds that no proof of pecuniary or special damage to the plaintiff or next of kin, in consequence of the death, was necessary to sustain the action. That case also holds that the existence of a widow to share in the damages, is not necessary to sustain the action; that the action lies in every case where the deceased could have sustained an action for the injury had she survived. The case of Quinn *v.* Moore, 15 *N. Y.* 432, also affirms the latter proposition.

The third and fourth propositions in the defendant's requests to charge, involve simply the questions of negligence on the part of the deceased and the defendants, which we have already considered. The fifth proposition was charged as requested. The case of Oldfield *v.* N. Y. & Harlem R. R. Co. 14 *N. Y.* (4 *Kern.*) 310, holds that it would have been an error for the judge to charge the latter branch of the sixth proposition, and it is not important, therefore, to inquire whether the first portion of the proposition is right or not; a request to charge the jury should be in such form that the court may charge in the very terms of the request, without qualification. Carpenter *v.* Stilwell, 11 *N. Y.* (1 *Kern.*) 61. The judge is not required to separate a proposition of this kind and pick out what is good and refuse the rest.* There was no error, therefore, in the refusal to charge the sixth proposition. But there is another answer to all these propositions. They were submitted as a series of propositions for the judge to charge, and there is but a general exception which states that the defendant excepted to the judge's refusal to rule and decide as requested in the foregoing propositions. Now, as several of the propositions are clearly erroneous, this general exception presents no question for review in this court. Caldwell *v.* Murphy, 11 *N. Y.* (1 *Kern.*) 416; Jones *v.* Osgood, 6 *N. Y.* (2 *Seld.*) 233; Hunt *v.* Maybee, 7 *N. Y.* (3 *Seld.*) 266, 273.

* Followed in Newman *v.* Cordell, 42 *Barb.* 448, 459.

There are several answers to the defendant's objections, that the complaint did not state the names of the next of kin, &c. In the first place, it is not necessary to state them, and in the second place, the objection cannot be taken on a motion for a nonsuit. If the defendant had desired to have the complaint more specific in this respect, his proper way was to move to have the complaint made more specific. And in the third place, as this objection was taken on the motion for a nonsuit, it could not prevail, for this court has held in the two cases of Quin *v.* Moore and Oldfield *v.* N. Y. & Harlem R. R. Co., above referred to, that the action depends on the right of the injured person to maintain an action for the injuries if he or she were living; and that the action lies in every case where the deceased could have maintained an action, were he or she living. This certainly settles the question that who are the next of kin is not material, so far as the right to maintain the action is concerned.

The objection taken to the evidence of Davis and Windecker cannot avail the defendant. The objection is a general one to the whole evidence. The most of this evidence was certainly wholly unobjectionable, and consequently the objection goes for nothing. If the counsel had called the attention of the judge to a particular portion of this evidence, by objecting to that specifically, very probably he would have excluded it. It is enough, however, that having objected to this entire evidence in gross, his objection cannot prevail for that reason.

The defendant's counsel proposed to ask the witness, Rose, whether this train stopped ample time for all the passengers to get off, including these ladies. This evidence was properly excluded. It presented one of the issues in the cause which the jury were to determine from all the evidence in the case, and the opinion of the witness was not competent evidence. It did not involve a matter of scientific opinion, or where the opinion of experts was competent. Cook *v.* Brockway, 21 *Barb.* 331; Morehouse *v.* Mathews, 2 *N. Y.* (2 *Comst.*) 514; Merritt *v.* Seaman, 6 *N. Y.* (2 *Seld.*) 168; Jeff. Ins. Co. *v.* Cotheal, 7 *Wend.* 72. This witness had stated the time of the stop to be from one and one-half to two minutes, while others had stated it to be thirty seconds to a minute; and there were

facts in the case upon which the jury were called upon to decide this question of fact. It is sufficient, however, that the evidence was not competent, for the opinion of the witness was not evidence upon such a subject. It was not competent for the defendant to prove by Cole and Woolever, although they were proved to have had experience in railroading, that in their judgment it was safer to run into the station, and discharge the passengers, than to stop either east or west of the station. It was a matter where the opinion of those men was not evidence. 21 *Barb.* 331; 2 *N. Y.* (2 *Comst.*) 514, 6 *N. Y.* (2 *Seld.*) 168; 7 *Wend.* 72.

The offer certainly went no further as a proposition, than to give the opinion of these men upon that subject, and was so treated and understood upon the trial. It was said by this court in the case of Daniels *v.* Patterson, 3 *N. Y.* (3 *Comst.*) 47–51, that before a party excepts on account of the rejection of evidence, he must make his offer in such plain and unequivocal terms, as to leave no room for doubt about what was intended; and if he fail to do so, and leave the offer fairly open to two constructions, he has no right to insist in a court of review upon the construction which is most favorable to himself, unless it appear that he was so understood by the court which rejected the evidence. The offer was treated and understood upon the trial, as but an offer to have the opinion of these men given to the jury upon that subject, and this it seems to me is but a fair construction. There is not a single fact stated which is offered to be proved to show that it was safer to go into the station; and besides, the offer of proof is based upon the distinct ground that these two witnesses were experienced men in railroading; Cole having been shown to be a conductor some eight years, and Woolever being an engineer upon the express train.

There is, however, another perfect answer to this offer of evidence, in any view which may be taken of the offer. The evidence was incompetent, as not being within the issue. There is not a single allegation, in the complaint, that it would have been safer to have stoppod the mail train either east or west of the station. Nor is there any allegation that it was negligence for the conductor of that train to run into the station. Nor

did the plaintiff adduce a single particle of evidence tending in the least to show that it was safer to stop short of, or go beyond, the station, nor was any such claim presented on the trial. The simple issue to be tried was, whether what was done afforded evidence of negligence, and not whether it would have been more negligent to have done something else. It is never error to confine the proof to the issue to be tried.

There are no other questions in the case; and where a trial and general verdict have been had, this court only deals with the questions of law, upon exceptions duly taken. We cannot consider whether the damages are excessive, or the verdict is against the weight of evidence. 14 *N. Y.* (4 *Kern.*) 310.

A majority of the judges concurred.

KELLY *v.* CAMPBELL.

December, 1863.

Except as against creditors, a gift of personal property by a husband to his wife, is valid without the aid of the Married Woman's Acts.

Declarations made by a husband at the time of giving his wife money, as to the purpose for which he gave it, and declarations as to the person for whom he was acting when he received a bill of sale made to his wife,—*Held*, competent testimony in favor of the wife as part of the *res gestæ*.

Catharine Kelly (for whom, on her death pending the action, David, her husband and administrator, was substituted as plaintiff), sued Anthony F. Campbell, in the supreme court, to recover the value of certain personal property taken by defendant as sheriff of Kings county, under an execution against Charles H. Jones.

On the trial it appeared that the plaintiff was a married woman, and claimed the property by virtue of a bill of sale from Jones, made before the execution was levied. The bill of sale was dated February 5, 1861, and delivered to plaintiff's husband, who stated at the time that he was acting for his wife. The consideration of the sale was the surrender of various notes payable to order, made by Jones to the plaintiff;

the notes having been given for money borrowed by Jones of plaintiff during a period of years. To prove that the money so advanced was her separate property, the plaintiff then called her daughter, who testified (under exceptions) that she had frequently heard her father tell plaintiff to do as she pleased with what he had given her, or what she had earned; that the money so received or earned, the plaintiff always kept herself, and deposited in bank.

The court charged the jury that the bill of sale conveyed to the plaintiff the title to the property sought to be recovered as between Jones and her husband, and authorized her to maintain the action for her separate property; to which the defendant excepted.

The counsel for the defendant then requested the judge to charge, 1. That the agreement between the husband and wife (if the evidence amounted to an agreement) was void. 2. That the money loaned to Jones by Mrs. Kelly was not proved to be her separate property.

The judge refused, and defendant excepted.

The jury found for the plaintiff, and judgment was ordered.

The supreme court, at general term, affirmed the judgment, on the ground that the question of the wife's separate property could not be raised by one who was a mere trespasser, and not a creditor of the husband.

The defendant appealed to this court.

John H. Reynolds, for defendant, appellant.

John K. Porter and *John Dikeman*, for plaintiff, respondent.

BALCOM, J.—The bill of sale of the goods, from Jones to Mrs. Kelly, was dated and executed February 5, 1861. Her coverture did not then prevent her from purchasing the goods and going into trade as a shoe merchant. *L.* 1860, p. 157, §§ 1, 2.

The action for the conversion of the goods by the defendant was properly brought in her name. *L.* 1860, p. 158, § 7; as amended by *L.* 1862, p. 344, § 7; *Code of Pro.* §§ 111, 114.

The bill of sale itself authorized Mrs. Kelly to maintain the

action in her own name, unless it was impeached for fraud. 27 *Barb.* 178; 32 *Id.* 293; 14 *N. Y.* 555.

The notes surrendered, as the consideration for the bill of sale, were payable to Mrs. Kelly or order, and the presumption was that they were given for a consideration moving from her, and were her separate property. But it was competent for her to prove by her daughter, Catherine D. Jones, that her husband gave her money from time to time, and told her to do with it as she pleased; and that she kept the money, so received, herself, and deposited it in a bank. This evidence tended to establish that the money she loaned to Jones for the notes was her own, and not her husband's.

A gift by a husband to a wife will be upheld, when the rights of creditors are not in question, without the aid of the statutes of 1848 or 1849, 1860 or 1862. 17 *Johns.* 548; 3 *Edw. Ch.* 92; 2 *Kent Com.* 9 ed. 155; Borst *v.* Spelman, 4 *N. Y.* 284; 7 *Johns. Ch.* 57; 3 *Paige*, 440; 4 *Barb.* 546; 8 *Paige*, 161; 3 *Bradf.* 7; 24 *N. Y.* 623; 2 *Bosw.* 92; 2 *Md. Ch. Decis.* 353; 5 *Penn.* 154; 29 *Id.* 43; 3 *Cush.* 191; 6 *Id.* 20.

The husband of Mrs. Kelly acted as her agent in taking the bill of sale, and would be estopped from claiming the goods as his own.

The court, therefore, properly charged the jury, that the bill of sale conveyed to Mrs. Kelly the title to the goods, as between Jones and her husband, and authorized her to maintain the action for her separate property.

The foregoing views also show that the court rightfully refused to charge the jury as requested by the defendant's counsel.

The whole charge is not set out in the case, and we must presume that the question of fraud was properly submitted to the jury.

Whether the verdict was against evidence is not within the province of this court to determine. The decision of the supreme court, that it was not against evidence, is conclusive upon the defendant.

What Mr. Kelly said when he gave his wife money, and also what he said as to the person for whom he was acting when he took the bill of sale—*i. e.*, that he was acting as agent for his wife, was *res gestæ*, and therefore competent evidence for his

wife. 23 *N. Y.* 502; 1 *Greenl. on Ev.* § 108; *Cow. & H. Notes*, 592 to 606; 1 *Den.* 141; 9 *Barb.* 271; 29 *Id.* 290.

For these reasons, I am of the opinion that the judgment of the supreme court should be affirmed, with costs.

All the judges concurred.

DAVIES, J., also read an opinion in favor of affirming the judgment.

Judgment affirmed, with costs.

KELLY *v.* TILTON.

December, 1866.

One who will keep a mischievous animal, with knowledge of its propensities, is liable, without proof of negligence, to a person not a trespasser, who is injured by it.

A stranger who, without authority from the owner of premises, enters thereon for a lawful purpose, by invitation of one who is lawfully there by license of the owner, is not a trespasser.

Thomas Kelly sued David Tilton, in the Brooklyn city court, to recover for injury sustained by being bitten by a dog kept by the defendant. The facts were these, in substance: The defendant was in the poultry business, in Brooklyn, in March, 1859, and had been, for several years previously. He had a yard which used for killing poultry and preparing it for shipping. He owned a dog, which he kept upon his premises. The dog's kennel was some one hundred feet from the entrance gate of the yard, and he was usually fastened thereto by a chain and leather collar, except at nights and upon Sundays. The ferocity of this animal, his habit of attacking and biting people, and the defendant's knowledge of his mischievous propensities, fully appeared from the evidence. On two occasions, in 1858, he had bitten persons visiting the defendant's premises on business; and, at another time, a person in the employ of the defendant; of all of which occurrences the defendant had notice. As late as March, 1859, he cautioned one of his men that he had just taken into his employ to keep out of his way

until he got acquainted with him. In short, the vicious character of the animal, and that the defendant had knowledge of it, were scarcely disputed questions on the trial.

In March, 1859, there was a quantity of old iron, scattered about and in a pile, in the rear part of the defendant's yard. Just prior to March 21, with the view, probably, of getting it out of the way, he told one of his employees, by the name of Barnes, and a lad named Pearsall, his step-son and a member of his family, to sell, or find a customer for, the iron. On March 21 the defendant was absent, and the yard was in the charge of Barnes and the defendant's step-son. About ten o'clock in the morning, the plaintiff, who was a junk dealer, was passing along the street with his wagon, and the boy, seeing him, came out, and took him in upon the premises to the iron. The plaintiff bought the iron, and turned to go to the street to bring in his horse and wagon to take a part of it away. As he was going out, the defendant's dog sprang out of his house or kennel, broke his leather collar, which there was evidence tending to show was old and worn, and bit the plaintiff's hand. At this moment the plaintiff was some twenty feet from the dog-house, and going in a straight direction from where the iron lay to the gate. It was the left hand that was bitten, and the bite was of a severe character. Two of the fingers were bitten, apparently, clear through, and for some three weeks the hand was exceedingly painful and sore, the plaintiff being unable to use it at all in his business. He was obliged to employ help in carrying on his business, spent some thirty dollars in attempting to cure it, and there was evidence that its strength was permanently impaired. After the bite, and the hand had been dressed by a druggist near by, the plaintiff returned and took part of the iron away. The next day he came again and took the rest of it away. Afterward, Barnes informed the defendant of the sale of the iron to the plaintiff, and he made no objection.

The complaint, besides alleging the personal suffering of plaintiff, alleged that he was thereby and still is prevented from pursuing his lawful business, and also was put to expenses amounting to thirty-five dollars, and laid the damages at one thousand dollars.

Upon the trial, the man Barnes was called as a witness, and, against the objection and exception of defendant, was allowed to state that the boy Silas Pearsall, called the plaintiff in from the street. Subsequently plaintiff was sworn as a witness on his own behalf, and was allowed, against the like exception, to testify that the boy called him in, and took him into the back of the yard.

The plaintiff was also allowed to testify, against the objection and exception of the defendant, that he had been obliged to employ more help than before, in consequence of his injury, according as he had heavy lifts.

These were the exceptions to evidence, insisted on in this court.

At the close of the plaintiff's evidence, defendant asked for a nonsuit on the grounds, 1st. That Barnes exceeded his authority in bringing plaintiff on defendant's premises; and he having no authority to do so, plaintiff was there as if upon his own motion, and without defendant's knowledge, and therefore was a trespasser, and took the risk upon himself of any injury; and, 2d. That plaintiff was negligent in going so near the dog; the dog being chained, was notice to the defendant to keep out of his way. The motion was denied, and plaintiff had a verdict.

The city court of Brooklyn, at general term, affirmed the judgment entered on a verdict in favor of the plaintiff, for four hundred and eighty-six dollars and seventy-five cents, with costs, and defendant appealed to this court.

R. M. Harrington, for defendant, appellant;—Cited *Story on Agency*, §§ 87, 88, 89, 90, 136, and cases cited; *Dunlap's Paley's Agency*, 270, and subsequent pages; 2 *Nol. Cow. & H. on Ev.*, note 182, p. 185, and cases there cited; Schumacker *v.* Locke, 10 *Moore*, 30; Ransom *v.* N. Y. & E. R. R. Co., 15 *N. Y.* 415; Terwilliger *v.* Wands, 17 *Id.* 54; Medbury *v.* N. Y. & E. R. R. Co., 26 *Barb.* 564; Dain *v.* Wyckoff, 7 *N. Y.* (3 *Seld.*) 191; Vanderslice *v.* Newton, 4 *N. Y.* (4 *Comst.*) 130; Wilds *v.* Hudson R. R. Co., 24 *N. Y.* 430.

John H. Reynolds, for plaintiff, respondent; Cited *Exodus* xxi. 28, 29, 30; May *v.* Burdett, 9 *Ad. & E. N. S.* 101; 58 *Eng. Com Law*, 99, affirmed in Card *v.* Case, 5 *Com. Bch.* 57 *Eng. C. L.* 622; Smith *v.* Pelah, 2 *Strange*, 1264; Boulton *v.* Banks, *Croke Charles*, 254; Jenkins *v.* Turner, *Lord Ray-*

mond, 110; Jones *v.* Perry, *Peak on Ev.* 292 (mar.); Putnam *v.* Payne, 13 *Johns.* 312; Barnes *v.* Fitzrandolph, *Addison* (*Penn.*) 215; Wheeler *v.* Brant, 23 *Barb.* 324; Loomis *v.* Terry, 17 *Wend.* 496, Jackson *v.* Smithson, 15 *Mees. & W.* 563; Sawyer *v.* Jackson, 5 *N. Y. Legal Obs.* 380; Rex *v.* Scully, 1 *C. & P.* 319; *Eng. Com. L.* vol. 11; *Broom on Common Law*, 932, 933; Hudson *v.* Roberts, 6 *Exch.* 697; Fairchild *v.* Bentley, 30 *Barb.* 147; Bennet *v.* Alcott, 2 *Term R.* 166; Althorf *v.* Wolfe, 22 *N. Y.* 355; Lincoln *v.* Saratoga & S. R. R. Co. 23 *Wend.* 425; Caldwell *v.* Murphy, 1 *Duer*, 233; affirmed in 11 *N. Y.* (1 *Kern.*) 416; Ransom *v.* N. Y. & E. R. R. Co., 15 *N. Y.* 415; Morse *v.* Auburn & S. R. R. Co., 10 *Barb.* 621; Curtiss *v.* R. & S. R. Co., 20 *Id.* 282.

WRIGHT J., [after stating above facts.]—Upon this state of facts, substantially, and under a charge of the court to which no exception was taken, save in a single particular, in respect to the rule of damages (which exception seems to be abandoned in this court as untenable), the plaintiff had a verdict. There was, however, a motion for a nonsuit, which (though made on specific grounds) may raise the general question whether the defendant, under the circumstances, was liable to answer in damages to the plaintiff.

I am of the opinion that, on this point, there is no error in the judgment. The vicious character of the dog, and the defendants' knowledge of his dangerous habits, were matters admitting of no dispute. A person keeping a dog, knowing him to be accustomed to bite mankind, keeps him at his peril. Whoever, say the court, in May *v.* Burdett, 9 *Q. B.* (*Ad. & E. N. S.*) 101, keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is, *prima facie*, liable in an action on the case, at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal, with knowledge of its mischievous propensities. Smith *v.* Pelah, 2 *Strange*, 1264; Card *v.* Case, 5 *C.* 622; 57 *Eng. C. L.* 622. It is no defense, in such a case, that the animal is safely kept; nor do I think it a defense that the party injured is a trespasser. In

the case of a dog of that character, it is the duty of the owner, having notice of his dangerous habits, to kill him. Smith *v.* Pelah, *supra;* Bolton *v.* Banks, *Cro. Ch.* 254; Jenkins *v.* Turner, *Ld. Raym.* 110. In Smith *v.* Pelah, the chief justice ruled, "That if a dog has once bit a man, and the owner having notice thereof, keeps the dog and lets him go about or lie at his door, an action will lie against him at the suit of a person treading on the dog's toes; for it was owing to his not hanging the dog at the first notice; and the safety of the king's subjects ought not afterward to be endangered. The *scienter* is the gist of the action." It is held, in the case of Loomis *v.* Terry, 17 *Wend.* 496, that a man may keep such a dog for the protection of his property in the night against felons; but this seems opposed to all the other cases, which hold that such an animal is a nuisance. But, be this as it may, if a person will keep a mischievous animal, with knowledge of its propensities, he is bound to keep it secure at his peril. May *v.* Burdett, 9 *Q. B.* 101; 58 *Eng. C. L.* 99: Jackson *v.* Smithson, 15 *Mees. & W.* 563; Card *v.* Case, *supra.*

It is not necessary, however, to deny, in this case, that it would be a good defense if the dog were safely and securely fastened. The judge charged the jury that, if the dog were securely fastened, that was a good defense. There was evidence that the dog was not securely fastened; and the jury, by finding for the plaintiff, say that he was not.

It may be admitted, also, that trespass is a good defense; and still, I think, there was no error. The plaintiff was not a trespasser. Conceding that Barnes and the boy Silas Pearsall had no authority to invite the plaintiff in, with the view of finding a purchaser for the iron that the defendant had directed them to sell, it is undisputed that they were lawfully on defendant's premises, by license from the defendant. When a person is lawfully on land, by license from the owner, and he invites a stranger in for a lawful purpose, such stranger is not a trespasser.

The two exceptions taken on the trial, I deem to be untenable. The judgment should be affirmed.

All the judges present concurred.

Judgment affirmed, with costs.

KENZEL *v.* KIRK.

December, 1866.

Affirming 37 *Barb.* 113; S. C., 21 *How. Pr.* 184.

The mere fact that a vessel is run on shares, by the captain, does not exonerate the owners from liability for supplies, purchased by the captain in the name of the vessel.*

Proof of sale of the supplies to the captain, and that his name was registered as such with the owner's in the registry of the vessel, casts the burden on the owners, to prove that the captain had the possession, command and navigation; and this is a question of fact.

William H. Kenzel brought this action, in the supreme court, against Edwin R. Kirk and others, owners of the ship Moonlight, to enforce payment for necessary supplies furnished to the captain.

At the time of the purchase, plaintiff was informed by the master, Rogers, that he was master; that the voyage was to the West Indies, and that the supplies were necessary for her.

The defendants proved that the master was running the vessel on shares, receiving half the earnings, and paying half the disbursements. He was to provision, victual and man the vessel; although it did not appear whether provisioning was considered as one of the disbursements. These facts, it was claimed, sustained the defense that the master was not the agent of the owners, but the hirer or charterer of the vessel, and had no power to bind the owners.

The plaintiff proved that he had no knowledge of the arrangement between the owners and the master; that the goods had been purchased in the name of the vessel and charged to her; that the vessel had originally been built for Rogers to command her, under an understanding that he was to do her business; that he had been in the habit of buying supplies for the vessel in ports were the owners did not reside, for which they paid; and that he was in the habit of doing with the vessel as other captains did. The plaintiff further showed that the owners dismissed the master at Key West, on

* Compare Macy *v.* Wheeler, 30 *N. Y.* 231; Vose *v.* Cockcroft, 44 *N. Y.* 415; affirming 45 *Barb.* 61; and Ford *v.* Crocker, 48 *Barb.* 142.

her outward trip, and took possession of the vessel, and of a part of the stores to recover for which this action was brought. Other details sufficiently appear in the opinion.

The judge refused to grant a nonsuit; and the jury found for plaintiff.

The supreme court, on appeal from the judgment entered thereon, held, that in the absence of any notice to the plaintiff that the vessel was let on shares, or of an opportunity, by reasonable care and caution, to ascertain the fact, the case would appear to be the ordinary one of the master of a vessel buying necessary supplies for the voyage. Reported in 37 *Barb.* 113; S. C., 21 *How. Pr.* 184. The defendants appealed to this court.

George F. Betts, for defendants, appellants.

Dennis McMahon, for plaintiff, respondent.

By the Court.—Peckham, J.—A *prima facie* case of liability was shown against the defendants, by proofs of the sale and delivery of the supplies to Rogers, as captain of the vessel. The fact that he was captain, gave him authority to bind the owners in the purchase of supplies, in the absence of any proof qualifying the relation of the parties. Saxton *v.* Read, *Hill & D. Supp.* 323, and cases cited.

It appeared on the trial that the vessel was registered in the name of the owners, with Rogers as captain. These facts being shown, it rested with the defendants to establish a defense. The defense attempted was that Rogers was not the agent of the owners, but ran the vessel himself as commander and owner *pro tempore*. I think the testimony failed to sustain the defense; at least it was not so clear that the defendants could call upon the court to nonsuit the plaintiff on that ground. The defense insists, that the mere fact that the vessel was run on shares, was sufficient to discharge the owners from responsibility, as it would prove that the captain was the owner *pro hac vice*, and not the parties who had hired the vessel to him. We cannot assent to that proposition. It cannot be sustained on principle or authority. The real question in all such cases is, who, by the charter-party, has possession, command and

navigation of the ship? A mere question of fact. 3 *Kent Com.* 138, 5 ed. There is nothing in this testimony inconsistent with the right of the owners to direct how and with what the vessel should be freighted, or at what rate of compensation or value, or when she should sail; the division of the earnings being a mere mode of compensating the captain for his services as their agent. The owners took the vessel from the captain at Key West, before her voyage was completed, and told him to leave her; they receiving the residue of the supplies bought of the plaintiff, then remaining unused on the vessel.

The captain, so far as appears, claimed no right to remain, but left, and never was again on board of her. There was no claim that the vessel had been chartered to the captain for any particular time.

On such facts it is impossible to say, as matter of law, that the captain was the owner for the time, and had possession and exclusive control of the ship. In the test cases in Massachusetts relied on by the appellants, it is held that each case must depend upon its peculiar facts as to whether the owner or the captain has possession, command and navigation of the ship.

In Webb *v.* Pierce, 1 *Curt.* 104, at p. 108, the court say, whether the owners are liable for supplies furnished to the captains, depends on the facts of the particular case, though the vessel has been taken on shares. It is a question of fact merely. Saxton *v.* Read decides this case. There the vessel was "run on shares." The court properly held then that the effect of the arrangement was to provide a mode by which the master's compensation was to be determined. It would not be profitable to criticise the numerous cases found in the reports of Massachusetts and other earlier States on this subject. Many are referred to in the cases already cited. See Baker. *v* Huckins, 5 *Gray*, 596. They are all based upon the same principle, viz: that the several owners are not liable when they have let the possession, command and navigation of the ship, not to one as an agent, but for the time as owner, as much so as a tenant of a house is owner for his term. In such case, the doctrine of agency has no application whatever. The hirer, then, in all contracts for supplies, acts for himself, and upon his own responsibility and credit, as much as the tenant of a dwelling in

the purchase of supplies for his family. See Macy *v.* Wheeler, 30 *N. Y.* 231; Stedman *v.* Feidler, 20 *Id.* 437.

When the hirer is the owner, for the time, of the vessel run on shares, the facts will show that the master not only commands the vessel, and manages her trade and employment, but victuals and mans her, and the moiety of the gross freight is not retained by him simply as a compensation for his services, but the share paid to the owners is rather to be regarded as their charter-money for the use of the vessel. 1 *Curt.* 112.

While the hirer is the temporary owner, he of course has more power over the vessel, her trade and employment, than an ordinary captain. The facts of this case, so far as presented, show simply an employment of the captain to run the vessel, not a hiring of the vessel to him. If the owners had said to the captain, we will pay you seventy-five dollars a month, or we will give you one-half of the gross earnings to sail her for us as captain, and you shall pay half of her disbursements, and find all her supplies, the responsibility of the owners for supplies to third persons ignorant of the arrangement, would not have been changed.

The captain in this case testified at the trial that he "did on board of this vessel, and with regard to her business, as captains generally do." He does not seem to have had, or to have claimed, any other authority or power in regard to her.

It would seem to be clear, therefore, that he never hired the vessel, either in the ordinary or in the legal sense of that phrase. He was simply an employee of the owners, and they remain liable for supplies.

There is no other question calling for discussion in the case. The fact that the supplies were purchased at a port other than where the vessel lay, is not presented and should not be decided. It was not argued as a ground of nonsuit, nor was the court requested to charge thereon. The charge was excepted to in gross, and hence no part is presented for review.

The judgment must be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

KIMBALL *v.* CONNOLLY.

December, 1866.

The owner of property who puts in a search for the purpose of obtaining a loan on mortgage, cannot maintain an action against the county clerk or searcher for a false return, in consequence of which the lender omitted to pay off an undisclosed incumbrance and the property was subsequently sold on execution without the owner having actual notice of the incumbrance; since payment of the incumbrance would not be a necessary consequence of a correct return disclosing it. The clerk or searcher is not chargeable with damages, at the suit of the owner who parts with nothing of value by reason of the erroneous return.

Elijah H. Kimball, executor and trustee under the will of Ellen Le Roy, sued Richard B. Connolly, the county clerk of New York, in the supreme court, to recover damages for an erroneous return made by one of his clerks or searchers to a requisition of search put in by plaintiff's testatrix.

Ellen Le Roy, the decedent, was, in 1858, the owner of a house and lot in the city of New York, and being desirous to obtain a loan upon a mortgage thereon, employed her attorney to search the title. The attorney made a requisition of search requiring defendant, as county clerk, to search for incumbrances against the premises. The defendant thereupon certified to the attorney that certain specified incumbrances existed against the premises and that nothing more was found. In fact, there was an incumbrance not mentioned in the return, consisting of a judgment in favor of one Smith against a former owner of the property, which was a lien at the date of the certificate, and should have been returned by the defendant. The plaintiff's testatrix paid defendant his legal fees for the search, and applied to an insurance company for a loan on the premises, and the company, on the faith of the certificate of search, made a considerable loan to her, satisfying first all liens certified by the defendant. And the judge found also that the loan was more than enough to have paid the omitted judgment, and that said judgment would have been paid, if it had been mentioned in the certificate of search. The testatrix and

the plaintiff were wholly ignorant of the existence of the omitted judgment. The creditor therein issued execution, and sold the premises thereon; the day for redemption passed, and the sheriff conveyed to the purchaser, who thereupon took possession by summary proceedings under the statute. Not until then, did the plaintiff learn the existence of the judgment. After paying costs of unsuccessful efforts to set aside the judgment on which the sale was had, the plaintiff compromised with the purchaser and paid him four hundred dollars for a reconveyance. He thereupon brought this action to recover from defendant, for the erroneous certificate of search, the sums which he had thus been compelled to pay.

The complaint simply alleged the employment of defendant to make the search, and the erroneous return and the sale, &c., under the judgment omitted, without making any reference to the mortgage loan, on occasion of which the search was made.

The judge before whom the cause was tried found the facts above stated, and held, as a conclusion of law, that the plaintiff was entitled to recover the sum paid to obtain a re-conveyance.

The supreme court, at general term, on appeal, reversed the judgment, and ordered a new trial, without, however, assigning their reasons therefor. The plaintiff appealed to this court, stipulating that, if the order should be affirmed, judgment absolute might be rendered for defendant.

R. H. Underhill, for plaintiff, appellant;—Cited, *Sess. L.* 1853, c. 142, §§ 4, 2, giving clerk's fees; Johnson *v.* Feseney, 3 *De Jex & J.* 13; Wendell *v.* Van Rennselaer, 1 *Johns. Ch.* 344; Jones *v.* Roberts, 9 *Beav.* 419.

Charles H. Glover, for defendant, respondent;—Cited, *L.* 1853, p. 265; 2 *L.* 1847, p. 560; Winterbottom *v.* Wright, 10 *Mees. & W.* 109; Thomas *v.* Winchester, 6 *N. Y.* (2 *Seld.*) 397; Tollit *v.* Sherstone, 5 *Mees. & W.* 283; Longmeid *v.* Holliday, 6 *Eng. L. & Eq.* 562; Strong *v.* Campbell, 11 *Barb.* 135; Florance *v.* Adams, 2 *Rob.* (*Louis.*) 556; Utica Ins. Co. *v.* Toledo Ins. Co., 17 *Barb.* 132; N. Y. Central Ins. Co. *v.* National Pro-

tection Ins. Co. 14 *N. Y.* (4 *Kern.*) 85; 1 *Greenl. on Ev.* §§ 78, *et seq.*; Button *v.* Hudson R. R. R. Co., 18 *N. Y.* 248; Hordem *v.* Dalton, 1 *C. & P.* 181; Griffin *v.* Colver, 16 *N. Y.* 489; Smith *v.* Compton, 3 *B. & Ad.* 407; Hamilton *v.* Cutts, 4 *Mass.* 349; Starr *v.* Vanderheyden, 9 *Johns.* 253; De Rose *v.* Fay, 3 *Edw.* 369; 4 *Id.* 40; Howell *v.* Baker, 4 *Johns. Ch.* 118; Bergal *v.* Wood, 1 *Id.* 402; Hawley *v.* Cramer, 4 *Cow.* 740, 741.

LEONARD, J.—An act of the legislature, passed in 1853 (*L.* 1853, p. 265), provides that the county clerk shall have a sufficient number of competent searchers in his office; shall cause searches, when ordered, to be made without delay; shall certify to the correctness of his searches, and shall be held legally liable for all damages resulting from errors, inaccuracies or mistakes in his return. The plaintiff insists that this statute casts upon the defendant a legal liability for the loss sustained by the estate of his testatrix.

If that loss is the direct consequence of the omission of the defendant to return the judgment against Moses Le Roy in favor of Smith, the position of the plaintiff is sound. It is impossible, however, to hold to such a conclusion. Mrs. Le Roy took no action in consequence of the omission in the clerk's return to the search. She bought no property, and parted with nothing of value by reason of the erroneous return. The insurance company might have been subjected to damage by the loss of the security, upon which they were induced to part with their money, relying upon the accuracy of the defendant's return; but that is not the case of Mrs. Le Roy. Her loss occurred from the non-payment of the judgment, and not from the error in the clerk's return. She obtained the loan for which she applied, and nothing was abated from it on account of this incumbrance. It was no injury, of which she can complain, to have the money paid to herself on effecting the loan, instead of having some part of it applied to the satisfaction of an outstanding judgment.

However probable it may be that the judgment would have been paid off by the insurance company out of the proceeds of the loan, if it had been returned upon the search, it is impossible to declare at this time that it would have certainly been so

applied. Her object in causing the search to be made was not defeated by the omission to return the judgment. She did not seek information about her title for any purpose but that of obtaining the loan. It is no ground of complaint that she was not awakened by the return to take action for the removal of this judgment. The knowledge which she would have derived from the return of it, would have been merely incidental; and it is uncertain whether the return, or the knowledge thereby acquired, would have been applied by Mrs. Le Roy to any purpose whatever. No one can say what actually would have been done, under a different state of facts from those which actually occurred. It is no answer to say that she could, or that she might, have paid the judgment, or prevented a sale: it does not make it certain that it would have been done. The payment was not a necessary consequence of a correct return by the clerk; and, without such a direct and necessary result, to flow from his act or omission, the defendant cannot be made chargeable with damages.

The rule as to damages, under this statute, is not different from that prescribed by the common law. When the damages are uncertain, indefinite, and incapable of being fixed, as the result of an act, negligence or omission, none can be imposed. Had a different rule been contemplated by the legislature, it would have been necessary to have imposed a fixed penalty; but the statute leaves it open to such damages as flow from the error, inaccuracy or mistake of the clerk, and can be ascertained to have been actually sustained.

The order appealed from should be affirmed, with costs, and the judgment be made absolute against the plaintiff.

All the judges concurred, except PORTER, J., not voting.

Order granting a new trial affirmed, and judgment absolute for defendant, with costs.

KING *v.* FITCH.

December, 1864.

In an action against an assignee for benefit of creditors, to recover property fraudulently bought of plaintiff by the assignor, and held by the defendant under the assignment, it is not necessary to aver any wrongful act on defendant's part in receiving the property, nor to aver a tender to the defendant of the notes or part payments received on the fraudulent purchase.*

In an action to avoid a sale for fraud, the evidence of fraudulent representations, to be submitted to the jury, need not be confined to representations made at the time of the sale, but may include statements made by the buyer long previous, where such statements led to the commencement of a course of dealing, of which the sale in question is a part, and where the buyer has never corrected such statements, but on further inquiry by the seller, has made similar representations.†

In seeking to avoid a sale of chattels on account of fraud, the fact that the seller would not have made the sale except for false representations, may be shown by the direct testimony of the seller, if he be a competent witness. This is not a matter of opinion, but the statement of fact within his personal knowledge.‡

Fraudulent representations made by an agent, are admissible under an allegation of fraudulent representation by the principal.

In such an action, it is enough for plaintiff to tender at the trial the debtor's notes, without canceling them, unless he be asked to do so.

Where the owner of property, which came lawfully to defendant's possession, demands a delivery of more than he is entitled to, the defendant, if he refuses absolutely to deliver any, cannot afterward object that the demand was of too much.

One whose property is obtained by a fraudulent purchase, and assigned by the buyer in trust for his creditors, does not necessarily ratify the title of the assignees by treating with them as owners of the property, before he has had opportunity to obtain full knowledge of the fraud.

Alexander King sued Abijah Fitch, in the supreme court, to

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* See Jessop *v.* Miller, p. 449 of this vol., and Latimer *v.* Wheeler, p. 85 of vol. 3; and Hathorn *v.* Hodges, 28 *N. Y.* 486.

† See, also, Hathorn *v.* Hodges, 28 *N. Y.* 486; Johnson *v.* Monell, p. 470 of this volume, and cases there cited.

‡ Compare Dillon *v.* Anderson, 43 *N. Y.* 231; Superintendent of Cortland *v.* Superintendent of Herkimer, 44 *Id.* 22; Cowdrey *v.* Coit, 44 *Id.* 382; reversing 3 *Robt.* 210; Champion *v.* Joslyn, 44 *N. Y.* 653.

recover damages for the conversion of a quantity of lumber, which it was alleged was fraudulently obtained by Thomas Nelson, the defendant's assignor, from the firm of A. King & Sons, the plaintiff's assignors.

The complaint alleged that in the years 1853, 1854 and 1855, Thomas Nelson had, by means of fraudulent representations, purchased lumber from A. King & Sons, which he had delivered to the defendant on April 1, 1856; that on April 6, 1856, the claim of King & Sons therefor had been assigned to the plaintiff, who was one of the partners in the firm of King & Sons; that on April 7 he had given notice to the defendant that the lumber had been fraudulently obtained, and demanded its delivery, which was refused.

Defendant's answer was a general denial.

At the commencement of the trial, a motion to dismiss the complaint, as not stating facts sufficient to constitute a cause of action, nor averring that the property was wrongfully received by the defendant, was denied, and defendant excepted.

On the trial, evidence was given of the following facts:

The firm of A. King & Sons were dealers in lumber, at Ithaca, New York, and Thomas Nelson, of Auburn, bought lumber of them, in 1853, in 1854, and in the spring of 1855, and again in the fall of 1855.

Plaintiff, being examined as a witness, was allowed to prove the representations made by Nelson, when he made the purchase in 1854, although that purchase had been all, or nearly all, paid for; and also the representations made on a purchase in the spring of 1855, although that had been partly paid for. This testimony was objected to, on the ground that plaintiff must be confined to representations made at the time of the purchase in controversy; but was admitted under exception.

The witness was then asked, "Would you have made these several sales except on the strength of these representations?" He replied no. This testimony also was received under exception.

The representations were then proved; and were to the effect that Thomas Nelson owed no one but King & Sons, that there was no danger in trusting him; that he had no paper in bank, that he kept no bank account except through King; and that

he was perfectly good. Some of these representations were made by Thomas Nelson; others were made by his son, Robert (who was his authorized agent to buy lumber), and were made by Robert when he was making purchases, other than the ones directly involved in this action.

In fact Nelson was largely embarrassed at the times of making these representations, had much paper in bank, and had seriously incumbered his property; and although he gave evidence tending to justify his representations, their falsity was clearly made out.

It appeared that he had made payments of cash on account of the purchase made in 1853, and on account of that made in in the spring of 1855; and that the lumber purchased in 1854 was sunk in the lake in course of transportation to him; but on its recovery, he gave his notes for it to King & Sons; but this note was not among those which plaintiff tendered to the assignees as below stated, nor among those produced on the trial. King testified that he did not know where it was.

When Nelson failed, nearly all the lumber that was in his yard was lumber he had thus purchased of King & Sons. He made an assignment of all his property to defendant, in trust for his creditors. This assignment was made March 25, 1856. About April 1, immediately on hearing of the assignment, plaintiff (to whom the notes and balance due had been transferred by his firm), went to Auburn, where Nelson did business, to look after the lumber.

The substance of the testimony in respect to this interview is stated in the opinion of DENIO, Ch. J.

About a week after this visit, he made a second visit, and made a demand of Mr. Fitch. As to this demand, he testified on the trial: "I went around first with Messrs. Nelson and Fitch, and identified the lumber. They said it was the lumber bought of me. We then went into the office. The defendant wanted to sell the lumber to Mr. Tuttle. The defendant said to me, 'You had better sell it to Mr. Tuttle.' I answered, 'No doubt I could sell it to Mr. Tuttle in a few minutes, if I could have the avails.' I then told the defendant the lumber was got of me by fraud, lying and deception, and it was my lumber, and I demanded the lumber. I had the notes in my hand.

The defendant said, 'You know I can't deliver up the lumber but I will hold on to the avails until I find who is the right owner.' I told defendant if he did not let me have it, I would make him pay for it, if he was able. I tendered him the notes. He stepped up, took the notes, looked them over, and handed them back, saying, 'I can't let you have the lumber.' I asked Mr. Tuttle to mark the notes, which he did. The defendant said he held the property as assignee, and could not let me have the property."

When the plaintiff rested, the defendant moved for a dismissal of the complaint, on the ground that the demand was for a greater amount than he could recover; that it embraced property that had been paid for; that the demand should have been made immediately upon ascertaining the transfer to the defendant; that the plaintiff had affirmed the contract; and on the ground that he did not cancel the notes on the trial. This was denied, and defendant excepted.

The defendant adduced testimony to the effect, among other things, that at plaintiff's first visit to Auburn he said nothing about fraud, but only complained that he had not been preferred in the assignment; that he asked for and received a statement of Nelson's affairs and his real estate, and visited the county clerk's office and looked at the records; that he expressed surprise that the debts were so much, but said he did not wish to quarrel; and wished the assignee to go on, and do by the property as he would by his own. The substance of other testimony in regard to the circumstances relied on by defendant as a waiver of the fraud, is stated in the opinion.

The judge's charge was as follows:

"When a party has been defrauded of his property under a pretended sale, he may, if he so elect, as soon as he discovers that fraud has been practiced upon him, rescind the sale and recover back the property; but, in order to avoid such a sale, he must restore what he received and all he received, &c. In applying this rule to the present case, plaintiff cannot recover for the lumber sold prior to the fall of 1855, because all such prior purchases had been paid for in whole or in part, and as to the portion partly paid for, he had not offered to return the money paid.

"If the firm of A. King & Sons did part with the property through the fraud of Nelson, the plaintiff is entitled to recover the value of the lumber, bought in the fall of 1855, in the hands of the assignees when demanded, provided the plaintiff has not debarred himself of his action after he became aware of the facts in the case and the condition of Nelson's affairs. While the law permits the seller to rescind the sale, it also requires that he shall do so at the first reasonable and practicable moment after he discovers the fraud. He must act promptly and without delay. If he affirm the contract after he has a knowledge of the fraud, even for a moment, he cannot afterward rescind. It is a question for the jury whether the plaintiff had so conducted himself on the occasion of his first visit to Auburn after the assignment, as to deprive himself of this action by an express or implied acquiescence in the sale after being fully informed of the facts of the case."

The judge also charged "that, although the demand of plaintiff was for all the lumber in the hands of defendant which had been purchased of A. King & Sons, plaintiff might still recover the value of the lumber on hand from the fall sales of 1855. If the demand was for too much, it was the duty of defendant to have offered to restore such as he was entitled to."

To each of these portions of the charge defendant excepted; as also to the judge's refusal to charge that defendant was entitled to a verdict because plaintiff had not actually canceled the notes which were given for the lumber.

The jury rendered a verdict for plaintiff for two thousand six hundred dollars, for which judgment was entered.

The supreme court, at general term, affirmed the judgment, for the following reasons, as stated in the opinion of the court, by BALCOM, J.: "When the defendant took possession of the lumber as assignee of Nelson for the benefit of his creditors, he took the hazard of Nelson having title to it. If he failed to ascertain of whom Nelson obtained the lumber, or the fraud he committed in purchasing it, it was his misfortune. I think we should presume without proof that the defendant was informed by Nelson of whom he obtained the lumber. The de-

mand was enough to put the defendant on inquiry as to the plaintiff's title. . . . The form of the demand cannot be very material, when it clearly shows that the plaintiff claims the property in question, and the defendant declines to let him have any property whatever. See 1 *Espinasse*, 31; 1 *Johns. Cas.* 706; 20 *Wend.* 171; 1 *Cow. Tr.* 2 ed. 303. I am of the opinion the demand of the defendant of the lumber for which the plaintiff recovered was sufficient, although it included other lumber to which the plaintiff had no title."

"I think evidence of Nelson's representations as to his solvency when he first obtained lumber of the Kings, was competent evidence for the plaintiff. It was for the jury to say whether the false views he first infused into the minds of the Kings continued and influenced them when they subsequently delivered lumber to him. See Zabriskie *v.* Smith, 3 *Kern.* 332; Hall *v.* Naylor, 18 *N. Y.* 588; 1 *Hill*, 311. The fact that Nelson paid for the lumber he first obtained, was not a bar to a recovery for what he subsequently got. He obtained all the lumber fraudulently; and all the defendant could ask was to have what Nelson paid considered in the assessment of damages, and this the judge directed the jury to do."

Defendant appealed.

John K. Porter, for defendant, appellant.

George D. Beers, for plaintiff, respondent.

INGRAHAM, J. [After stating the facts.]—The objection to the sufficiency of the complaint was not well taken. The offense consisted in fraudulently obtaining the property by Nelson. When that was made out, the title remained in their vendors, and it was not necessary for plaintiff to show any wrongful act on the part of the defendant in receiving the property. When the plaintiff showed fraud in the purchase, and a demand of the property from the person in possession, he made out a *prima facie* case to entitle him to recover. It is not necessary to inquire whether, if the defendant had been a holder for value without notice, he would have been protected, because if he was such a holder the onus of proving that fact

was on him, and because in this case it appeared that the defendant's claim was merely as assignee under a voluntary assignment for the benefit of creditors, and that nothing was paid by the defendant therefor.

Nor was it necessary to aver that the plaintiff had tendered back what he had received upon the purchase. The facts proved showed there had never been a valid contract. The whole cause of action rested upon that issue. The subsequent matters which were necessary to be shown on the trial, in regard to the return of what had been received, did not go to make out a cause of action, but to relieve the plaintiff from any supposed affirmance of the sale after he obtained knowledge of the fraud. Such evidence is rather to rebut the presumption which the defendant might claim to exist from the acts of the plaintiff as affirming the contract.

The cause of action is that the title was in the plaintiff's assignors and that no title ever passed to Nelson. Whether the plaintiff had in time disaffirmed the contract, or whether he had done everything necessary to prevent the defendant from claiming that he had waived his right to resume possession of the property, was matter of evidence to be furnished, and which would go to make out the cause of action or defense, but not necessarily matter to be averred in the complaint.

The declarations of Nelson as to his solvency made at the time of purchases prior to 1855 were admitted in evidence against the defendant's objections. These declarations were the inducements to the first sales, and they undoubtedly remained in the remembrance of parties afterward. Nothing had been done by Nelson to correct them, but on the contrary, when the firm of King & Sons declined making further sales, similar representations were again repeated. I see no ground of objection to the testimony. The evidence shows, from the commencement, the intention of impressing upon the minds of the vendors that Nelson owed nobody but them, and that there was no danger in giving credit to him.

The inquiry is whether the purchaser made any false statements by which the vendor was deceived and the property obtained from him. Such fraud may be practised by a continuous course of misrepresentation during a series of transactions

and still continued notwithstanding the first purchases were paid for. In fact such payment may be a part of a scheme to gain the confidence of the vendor, and induce him to make further sales and to give larger credit. Zabriskie *v.* Smith, 13 *N. Y.* 322, 332.

The question was put to plaintiff whether he would have trusted Nelson but for these representations. The objection was not to the form of the question as leading, but to the permitting the vendor to state whether he gave credit on them. This could only be known to himself, and it was a material ingredient in the plaintiff's case. If the vendor may not say whether he gave credit on the strength of the representations, or whether he would have trusted the purchaser without them, it becomes a matter for the jury to guess at without the only positive evidence there can be on the subject. I know it is subject to the criticism that it is the conclusion of a witness, but not justly. The conclusions of a witness are the results of his judgment upon various facts coming to his knowledge, and are properly excluded because the jury can form similar conclusions themselves; but this inquiry is as to the cause of action on the part of the vendor in making the sale, and the inducements which led to it. It is not what he thinks of the acts of others, but what he did himself in consequence of these acts.

Some of the purchases were made by the son Robert in the absence of the father. The representations made by him were offered in evidence and objected to. The whole price to be paid for these purchases had not been paid, and the goods which were the subject of purchase formed part of the property claimed and demanded by the plaintiff.

Robert Nelson must be treated as the agent of the purchaser while acting for him. His representations made at the time of the purchase, if false, would vitiate the contract the same as if made by the purchaser. For this reason the evidence was admissible. It was not necessary to aver in the complaint that the representations were made by the agent and not the principal. That was only a matter of evidence. Indeed, as before stated, no such averments are necessary in the complaint, especially where the action is to recover back the property. Even if the plaintiff chooses to waive the tort and sue on contract,

it would be unnecessary to set out such matters in the complaint. This was held in Roth *v.* Palmer, 27 *Barb.* 653, 656. HOGEBOOM, J., says: "I think the plaintiff might properly and preferably have prosecuted simply for goods sold and delivered, and allowed the rest of the transaction to come out as matter of evidence." It was no more necessary to aver that the representations were made by an agent than by the principal, and in both cases such matters were properly treated as evidence, and not as part of the cause of action.

A question was asked of Nelson as to the cost of his real estate. This was excluded, and the defendant excepted. I am at a loss to see what relevancy this question had to the matter in issue. How he lost his property was immaterial. Whether he had any or not when the representations were made would have been pertinent. The defendant appears to have offered this evidence to explain the insolvency of Nelson. As no such inquiry could properly come before the jury, there was no ground on which this evidence could have been received. Proof that he had lost his property without the least fault, would not excuse the representation that he had property after it was expended.

The plaintiff tendered the notes held by him at the trial, but did not cancel them. This was made a ground of motion for nonsuit. The cancelment of the notes was not necessary at the time. It was sufficient to produce them on the trial. Being the notes of the debtor merely, they cease to be of any value the moment it was settled that the contract was void. S. L. SELDEN, J., says, in Nichols *v.* Michael, 23 *N. Y.* 264, 273: "It would be more in consonance with equity to hold it sufficient to produce the notes upon the trial and surrender them to the custody of the court, as in that case the rights of both parties are protected. If the fraud is made out and the contract subverted, the notes are void and will be canceled by the court. If the plaintiff fail to establish the fraud, the notes can be returned to him if the nature of the contract is such that justice requires it." Such I think to be the proper rule in similar cases.

When the plaintiff demanded the lumber of the defendant, he tendered the notes he had received from Nelson and de-

manded all the lumber. Of this, some parcels had been paid for entirely, and some in part. The defendant asked for a dismissal of the complaint on this ground. It is conceded that, if the action had been against Nelson, the purchaser, no demand would be necessary, but that, inasmuch as the defendant received the property lawfully and without notice of any fraud, a demand was necessary to entitle the plaintiff to maintain the action. If any demand was necessary, it was such a demand as would put it in the power of the defendant to comply without exposing himself to liability to other parties. Had the defendant complied with the plaintiff's demand, and delivered up to the plaintiff all the lumber in his possession that was bought of King & Sons, he would have beeen liable to the creditors, for whom he was trustee. Personally, he had no knowledge as to which of the parcels of lumber were paid for and which were not, while the plaintiff had such knowledge; and I cannot think, with the learned judge who delivered the opinion below, that we should presume, without proof, that the defendant was so informed by Nelson of whom he obtained the lumber. The whole case shows the defendant to have been lawfully and innocently in the possession of the property, and if the plaintiff conceived he had a claim on any part of it, fair dealing required that he should designate what parcels of lumber he claimed to have redelivered to himself. If he had demanded all the assigned property because one parcel purchased by Nelson had not been paid for, no one would for a moment suppose, either that the defendant was bound to comply with the demand, or that the plaintiff had done what the law requires him to do to entitle him to a right of action. I can see no difference where he demands four or five different parcels, sold at different times, because one parcel had not been paid for. If the defendant, in answer to this demand, had objected on the ground that he did not know which part was not paid for, and requested the plaintiff to specify what he was entitled to, I think the demand would not have been sufficient. But the defendant put his refusal on an entirely different ground, showing his determination not to deliver up any of the property, but to await the result of the litigation. He said "he could not deliver up the lumber, that he was able to pay for

it, and should hold on to it or the avails of it until he knew who was the right owner." This rendered any further demand unnecessary. It was a refusal to deliver any of it, not based on any insufficiency of the demand, but an absolute denial of the plaintiff's right to it, and a refusal to deliver any to him.

Another question is as to the sufficiency of the tender to warrant the recovery. It is now well settled where the creditor held nothing but the purchaser's notes for the goods purchased, that it is not necessary to tender such notes before action, but that it is sufficient to produce them on the trial to be canceled. Nichols *v.* Michael, *supra*. And it is equally well settled if he has received the notes of other persons or other property on account of the purchase, he must restore or offer to restore the same before suit. This was so stated in Nichols *v.* Michael, as the general rule. "Where one party to a contract elects to rescind it for fraud, it is an indispensible preliminary that he surrender all that he has received from the other party upon the contract. BEARDSLEY, J., in Mason *v.* Bond, 1 *Den.* 72, 74, says: "The party who would disaffirm a contract must return whatever he has received upon it. He cannot hold on to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto* if at all." Baker *v.* Robins, 2 *Den.* 139; Fisher *v.* Conant, 3 *E. D. Smith*, 199. This rule was recognized by the judge upon the trial. He told the jury, "In order to avoid such sale, the party rescinding must restore what he has received, and all he has received." This was all the defendant had a right to claim. No part of the lumber purchased in the fall of 1855 had been paid for. The vendor had received nothing except the notes of the purchaser, and these were produced on the trial. In regard to this portion there was a good cause of action made out if the contract was fraudulent, and the judge therefore rightly refused to dismiss the complaint on this ground. As he instructed the jury that the plaintiff could not recover for any other sales except those in the fall of 1855, it was unnecessary to give the jury any further instructions in regard to the money paid on former purchases. The remaining question is as to the propriety of submitting to the jury whether the plaintiff had not affirmed the contract on his first

visit to Auburn. He had told the jury that the seller, if he rescinds the contract, must do so at the first reasonable and practicable moment after he discovers the fraud. If he affirms the contract after he has a knowledge of the fraud, even for a moment, he cannot rescind, and he submitted to the jury whether what he did at Auburn was such an affirmance.

It is not by any means clear from the evidence that the plaintiff, when he went to Auburn, had full knowledge of the circumstances attending the alleged fraud; and whether he had or not, was, I think, properly submitted to the jury. It does not appear that the plaintiff had any knowledge when the debts were created or what debts were owing at the time the representations were made. On various points connected with this part of the case, there was uncertainty calling for the finding of the jury.

A point is made as to the amount of damages. That was a question of fact, which, if erroneously found, should have been corrected in the court below.

The judgment should be affirmed.

DENIO, Ch. J.—The point most earnestly insisted on by the defendant's counsel is, that the plaintiff, by his conduct when at Auburn on April 1, 1856, ratified the sale of the lumber to Nelson, and thereby precluded himself from claiming that it was void on account of fraud.

No controversy exists as to the state of the law upon the effect of a ratification of a sale induced by fraudulent representations. The vendor may affirm it notwithstanding its original defective character, and pursue his remedy for the purchase price, or he may treat the sale as void, and claim the property as owner; but in the latter case he must act promptly as soon as he has discovered the fraud. While he continues under the influence of the fraudulent representations, his acts or declarations will not prejudice him, but will be considered as of the same character as the original assent, by means of which the property passed into the purchaser's hands.

The judge charged in accordance with these principles, and it is not claimed that there was any error in the manner in which the law was laid down, provided the jury had any office to per-

form in respect to the question. But it is argued that the alleged acts of ratification were of such a character, and that they were so conclusively established, that no question of fact should have been left to the jury. There is no dispute upon the evidence, that the plaintiff, when he first came to Auburn, after the assignment, and was made acquainted with it, and with the fact that Nelson's accommodation indorsers were preferred before him, spoke of the affair to the defendant, and to Nelson in the defendant's presence, as one by which he was concluded, nor that he then wholly omitted to assert any claim to the lumber based upon the invalidity of the sale, or any defect in Nelson's title, The testimony of the defendant and of ThomasNelson, was positive to that effect, and it was corroborated by evidence of the conversation of the plaintiff with several other persons on the same day. The plaintiff then knew that the defendant was proceeding to execute the trust contained in the assignment, as though that instrument had passed to the defendant the title to the property which he claims to recover in this action. The plaintiff's testimony as a witness on his own behalf does not contradict the essential points of that given on behalf of the defendant upon this branch of the case. He swore that he did not recollect proposing to Robert Nelson to purchase lumber of the defendant as assignee, or telling the defendant to sell it, but he did not pretend that he claimed to be still the owner, although he swears that he did complain to the defendant of fraud having been committed in the purchaee of it from his firm. After the defendant had given the strong evidence which I have mentioned, the plaintiff was not again called to contradict or explain the declarations of acquiescence attributed to him by the defendant's witnesses.

I think the judge might well have assumed it to be proved by uncontradicted evidence, that the plaintiff on that occasion, in his conversation with the defendant and with others in his presence, assumed that all the lumber passed to the defendant by virtue of the assignment, and that he expected the defendant to execute the trust contained in that instrument. I am, moreover, of opinion that if it were equally clear that the plaintiff had at that time the same full information respecting the fraud which he now sets up, which he had when he came to

make the demand of the lumber about a week afterward, the defense of ratification should have been held to be established, and the jury should have been directed to find their verdict for the defendant. But it is not so clear that he had such information. One of the points of the alleged fraudulent representation was that Nelson owned a large real estate which was but slightly incumbered, and another that he was abundantly responsible. The evidence of the fraud would, of course, consist in the falsity of these representations, and could be ascertained only by comparing his property with his indebtedness, and the value of his real estate with the charges upon it. The plaintiff came to Auburn, where the facts could be ascertained, on April 1, and returned the following morning. He obtained a certain amount of information, but apparently not sufficient to enable him to act upon the assumption that a fraud vitiating the sale had been committed. He received certain statements concerning Nelson's indebtedness from Robert Nelson, his son. He appears to have acquainted himself with the material terms of the assignment, and was informed of the amount of the accommodation paper preferred by it, but he made no examination of the real estate; and he came away without challenging the sales as fraudulent. He himself says that he complained of fraud, but this is denied by the defendant's witnesses. Nearly a week elapsed when he came again, accompanied by his son, one of the firm who were the vendors of the lumber. They spent the forenoon in examining the real estate of Thomas Nelson and the lumber on hand, and obtaining statements of Nelson's indebtedness, and then the plaintiff for the first time took the ground that Nelson's purchase of the lumber was void on account of the fraudulent representations; and he demanded that such of the lumber as had been purchased by Nelson from his firm should be given up to him. That he acquired some additional information bearing upon the integrity of the alleged representations at his second visit to Auburn is evident.

The fraud upon which the jury rendered their verdict condemning the sale may have been that which related to the value of the real estate beyond the incumbrances. The knowledge respecting that value was acquired by an examination of that property on the last occasion. So of the indorsed paper.

The additional statements which were furnished on the last visit, showing that indebtedness to have existed substantially as it stood at the time of the assignment, for several years before, and during the whole period of the representations, may have been necessary to complete the evidence of fraud which has been found sufficient to avoid the sale. I concede that many of the most important features of the case were disclosed at the first time the plaintiff was at Auburn, but I am not able to say that the plaintiff was at that time fully informed of all the material facts which were subsequently shown to prove the case on the plaintiff's part. Hence I think it was not the duty of the judge to withhold from the jury the question whether the plaintiff, when he omitted to challenge the defendant's title at the first instance, was fully informed of the fraud. I do not say but that, as a juror, I should have held that the information was sufficient to make it his duty to determine finally which course he would pursue before leaving Auburn on the 1st or 2d of April, but the evidence was not so positive and certain that the judge was entitled to decide the case himself. He therefore committed no error in submitting it to the jury. If the defendant has suffered wrong by the verdict, it was the fault of the jury and not of the judge.

At the commencement of the trial the defendant's counsel moved for a dismissal of the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and especially that it did not state that the defendant *wrongfully* received the lumber from Nelson. The action was brought for the conversion, by the defendant, of the personal property of King & Co.; and when it was allowed to have separate names for the different kinds of action, for the sake of convenience it would have been denominated an action of trover. All that it was necessary to allege in the pleadings was that King & Co., the plaintiff's assignors, were the owners of the lumber, that it had come into the possession of the defendant, and that he had converted it to his own use. All this is plainly set forth in the complaint. In addition to that, the plaintiff saw fit to state his own title, namely, the original ownership of King & Co., and the form of a sale to Nelson, which was effected with fraud, and that he wrongfully delivered the property to the defendant; and instead of confin-

ing himself to a simple statement of a conversion, he adds an allegation of a denial and refusal. I do not perceive that these statements of evidence modify or in any way impair the material allegations of property in the plaintiff, and a conversion by the defendant. It was quite unnecessary to state that the defendant wrongfully received the property. Trover is not based on a wrongful taking, but consists in an unlawful conversion. There was, therefore, no defect in the complaint.

It appeared that Nelson had purchased lumber of King & Co. in the years 1854 and 1855. The plaintiff, when under examination as a witness in his own behalf, was asked by his counsel to state what representations were made by Nelson when he made the purchases of lumber in 1854, and the question was allowed to be answered; and by the answer certain representations were shown to have been made when Nelson came to make the purchases in that year, and there was an exception to that ruling. It subsequently appeared that all the lumber purchased in 1854 had been paid for; but at a later period of the trial the plaintiff's counsel made the same inquiry of another witness as to representations in 1854, and a similar exception was made to the ruling admitting the question. There was a series of purchases of lumber on credit of King & Co., extending through both the years 1854 and 1855, and the plaintiff's effort was to prove that, during the whole time, Nelson was largely indebted and in insolvent circumstances, carrying large accommodations at the bank at Auburn, but constantly represented himself to be free from debt and a person of competent means; and the proof tended to show such a state of things. Now, although the purchases of 1854 had been paid for, and the whole arrearages of indebtedness were on account of the purchases in the fall of 1855, that does not render the representations made during the earlier dealing wholly immaterial. It is not essential, in order to avoid a sale in form, on the ground of fraud, that the fraudulent representations should be made at the very time when the purchases sought to be avoided were made. Where the dealing is continuous or at short intervals, representations made at any time in the course of such dealings may, if the jury so find, be held to influence the seller in respect to the subsequent sales. The evidence in this case was that

Nelson, or his agent, was interrogated on each occasion of purchasing lumber of King & Co., and on each of those occasions made similar declarations; and that his other indebtedness and ability to pay in each of the years mentioned were substantially the same. I am of opinion that there was no error in admitting the declarations made on each occasion of purchasing, though the earlier purchases had been paid for. See Zabriskie *v.* Smith, 13 *N. Y.* 322.

Some of the representations relied on, were made by Robert Nelson, the son of Thomas Nelson, who was his agent in that respect, and was in his employment and had a general knowledge of his property and affairs. The defendant's counsel objected to these representations on the ground that they were not set out in the complaint, and that they were not made at the time of the purchase of the lumber which had not been paid for, but on the occasion of former purchases. I have already said that it was unnecessary for the complaint to state the representations upon which the purchaser obtained possession of the property. The competency of the declarations of an agent when engaged in making purchases in behalf of his principal was not questioned. They are regarded in the same light as representations made by the principal himself; and it has already been shown that, although they preceded the time of the particular purchase which is drawn in question, they are proper to be submitted to the jury, and it is for them to determine whether, under the circumstances, they had a just influence upon that purchase.

The plaintiff was permitted to testify that he would not have disposed of the lumber to Nelson upon credit, except for the representations which he made as to his circumstances; and there was a similar ruling on taking the testimony of Joseph King, a witness for the plaintiff, who was a partner of the firm of King & Co., and, as such, took part in the sale of lumber to Nelson. The defendant excepted to these several rulings. It is a part of the transaction which a party seeking to avoid a sale of property on account of fraud must establish, that the sale was induced by the representations and would not otherwise have been made. The defendant's argument is that this can only be shown by facts and circumstances, to be submitted

to the jury, and that the direct testimony of the seller as to their influences upon his mind cannot be received. No doubt the intrinsic facts may be strong enough in a given case to establish the position, and it may also be true in a particular instance, that representations apparently pertinent to induce a sale, were not in truth the persuasive cause, the vendor having wholly relied upon other information, which he supposed correct, but which turned out to be erroneous.

The precise point to be established is the effect upon the mind of the seller produced by the purchaser's wrongful declarations. Where the seller is so situated as to be a competent witness, he can prove with entire certainty how far he was influenced by what the purchaser had said, and how far he yielded to the force of other facts or other information. I see no reason why he should be precluded from speaking. It is not an opinion which he is called upon to give, but the statement of a fact within his personal knowledge. The cases respecting the opinions of witnesses have, therefore, no bearing upon the question. Where the direct testimony of the seller is not obtainable, the facts attending the transaction may be sufficient; but it is because they prove the essential point argumentatively. The jury in such cases infers the principal fact by applying their experience to the ascertainment of the effect which the representations, under the circumstances, would be likely to produce. It would be illogical to exclude the direct testimony of the person whose mind is said to have been influenced by the seller's representations, where he is otherwise competent to testify as a witness. Suppose a sale to have been made by an agent to an insolvent person, would it not be competent for him to swear in an action by his principal that he assented to the sale, and parted with the possession of the property, because the purchaser represented that he had a large estate and owed nothing? On the trial of indictments for obtaining money, *or property*, or other valuable things, by false pretenses, it is the constant practice to ask the prosecutor whether he parted with the money, or property, by reason of the statement of the prisoner. It is undoubtedly essential that statements should be of such a character as would naturally lead the owner of property to sell it to the party making them. Whether they

actually did have that effect, may be shown by the oath of the owner, provided he be a competent witness.

Nelson was the owner of considerable real estate in 1854 and 1855, and down to the time of his failure. It did not appear when he purchased it. The defendant, when under examination as a witness in his own behalf, was inquired of by his counsel as to what his real estate cost him, but the question was excluded on the objection of the plaintiff's counsel that it was immaterial. It had no bearing on the case unless the purchases were made during or shortly prior to Nelson's dealing with King & Co. If connected in point of time with these transactions, and before the failure, it might have a bearing upon Nelson's good faith, for if the purchases were made at exorbitant prices, it would tend to show that his means had been absorbed, or his indebtedness had been suddenly created by these purchases. The objection sufficiently intimated to the examining counsel that some further fact was necessary to show the evidence to be pertinent, but nothing to connect it with the representations was offered. Immediately after the exclusion the defendant was permitted to and did testify fully as to the value of his real estate in 1854. This was everything on that subject which had any bearing upon the issue.

The demand which the plaintiff made of the defendant on the delivery of the lumber was more comprehensive than his rights. There was among the lumber in the plaintiff's possession, not only that purchased in the fall of 1855, but portions of that purchased in the spring of that year, and some of that purchased in 1854. This had all been paid for or partly paid for, and as to that on which a partial payment had been made, there was no offer to return the money which had been received. The defendant, however, did not put his refusal on that ground, but claimed to hold the whole under the assignment. There are two answers to the exception arising out of this branch of the case. The possession of Nelson, the sale being void, was wrongful. He might give a good title to a *bona fide* purchaser, but an assignee for the benefit of creditors does not occupy that position. The possession of this lumber was always, in judgment of law, in the vendors. The defendant was in no better position to defend this action than if he

had been the servant of Nelson. Ash *v.* Putnam, 1 *Hill*, 302; Cary *v.* Hotailing, *Id.* 311; Olmsted *v.* Hotailing, *Id.* 317. The answer made by the defendant dispensed with a more discriminating statement of what the plaintiff conceived himself entitled to. The defendant maintained that his title under the assignment enabled him to retain all the lumber which had come to his hands, and he refused to lend any countenance to the claim of the plaintiff.

It was made a point in the prayer for instructions, that the plaintiff had not canceled the notes given for the lumber. He had offered to surrender them when he made the demand, and he produced them in court at the trial. If the defendant had required anything further to be done, it was for him to suggest it.

No point was made on the trial as to the protest of some of the notes by the bank at which they were made payable. The judgment appealed from, should, in my opinion, be affirmed.

All the judges concurred, except, MULLIN, J., who was for reversal.

Judgment affirmed, with costs.

KING *v.* PLATT.

March, 1867.

An appeal may be taken to the court of appeals from an order of the general term affirming an order of the special term denying a motion to set aside a judicial sale made under a judgment.

Such an order is final; it affects a substantial right; and it is an order made upon a summary application in an action after judgment.

Such an order is not purely discretionary with the court below, in such a sense as to prevent it from being reviewed.

An appeal in such a case is in time if taken within two years from the entry of the order. The order is in the nature of a judgment, within the meaning of the Code of Procedure.

Charles King, Edward J. King and Sylvester Brush, sued Nathan C. Platt, in the supreme court, to compel the specific

performance by the defendant of an agreement to purchase real estate in New York. The purchase price was seventy-five thousand dollars, and the time fixed for the performance was October 6, 1860. It resulted in a judgment in favor of the plaintiffs, which was entered on March 15, 1862.

This judgment adjudged the balance of the purchase money unpaid, with interest, to be seventy-eight thousand four hundred and twelve dollars and sixty cents, and directed the defendant to complete his purchase within ten days, by paying the costs, &c., and twenty-two thousand one hundred and sixty-two dollars and sixty cents of the purchase money due, and execute and deliver his bond and mortgage on the premises to secure the balance (fifty-six thousand two hundred and fifty dollars).

It was further adjudged, that if the defendant failed to comply with the judgment within the ten days, then that the premises be sold at auction under the direction of a referee; and that out of the proceeds of the sale the referee pay costs, &c., and the amount due the plaintiffs, and deposit any surplus to abide the order of the court; and if there should be a deficiency, that the defendant pay the same, &c.

No appeal was taken from this judgment. When the sale took place, the whole property brought seventy-five thousand nine hundred and fifty dollars, and was purchased by or in behalf of the plaintiffs, leaving a deficiency of about ten thousand dollars.

The premises were conveyed to the plaintiffs by the referee, and he made and filed his report.

On February 12, 1863, the defendant procured an order requiring the plaintiffs to show cause why the sale made should not be vacated and set aside, and a re-sale ordered.

This order was obtained on affidavits suggesting the following as grounds upon which a re-sale was moved for:

1. That the sale was made on the day of a *charter* election.
2. That the auctioneer, named in the notice, did not personally officiate at the commencement of the sale.
3. That the price bid was inadequate.
4. That the plaintiffs approached bidders at the sale, and deterred them from bidding, and prevented competition, &c.

These allegations were met and substantially denied by affidavits on the part of the plaintiffs; and when the motion came on to be heard at special term, an order was first made referring it to a referee, "to take proof whether any, and if so, what inducements, communications or representations were made or held out by the plaintiffs or their agents, or in their behalf, or by the referee, to deter or prevent bidders at the sale had under the judgment in this action;" and he was directed to report proof to the court. On the coming in of the report, counsel were again heard upon the report of the referee and the original papers, and on December 18, 1863, the motion was denied, with costs. This order was affirmed at the general term, and from the order of affirmance the appeal of the plaintiff was taken to this court, December 29, 1866. Defendant moved to dismiss the appeal.

John H. Reynolds, for the motion.—That the order was discretionary and final, cited Dows *v.* Congdon, 28 *N. Y.* 122; Buffalo Savings Bank *v.* Newton, 23 *Id.* 160; Wakeman *v.* Price, 3 *N. Y.* (3 *Comst.*) 334; Hazleton *v.* Wakeman, 3 *How. Pr.* 357; People *v.* N. Y. Central R. R. Co., 29 *N. Y.* 418. That the appeal was too late, *Code*, §§ 11, 331.

James Emott, opposed.—That the appeal was in time, Bank of Genesee *v.* Spencer, 18 *N. Y.* 152; Wolcott *v.* Holcombe, 31 *Id.* 152. That the order was appealable within subd. 3 of section 11 of the Code, People *v.* Central R. R., 19 *N. Y.* 422; McGregor *v.* Comstock, 19 *Id.* 583; Selden *v.* D. & H. Canal Co., 29 *Id.* 637; Dows *v.* Congdon, 28 *Id.* 122; Buffalo S. Bank *v.* Newton, 23 *Id.* 160; Wakeman *v.* Price, 3 *N. Y.* (3 *Comst.*) 334; Hazleton *v.* Wakeman, 3 *How. Pr.* 457; Collier *v.* Whipple, 13 *Wend.* 228; Tripp *v.* Cook, 26 *Id.* 143. That the order involved strict legal right, Dows *v.* Congdon, 28 *N. Y.* 124; Thompson *v.* Davis, 13 *Johns.* 115; Twining *v.* Morrice, 2 *Brown Ch.* 331; Jackson *v.* Crofts, 18 *Johns.* 110; Collier *v.* Whipple, 13 *Wend.* 226; Brown *v.* Frost, 10 *Paige*, 246; American Ins. Co. *v.* Oakley, 9 *Id.* 259; Gould *v.* Libby, 24 *How. Pr.* 440; *Story Eq. Jurisp.* 293; 1 *Sugden V. & P.* 96, § 12; Brisbane *v.* Adams, 3 *Comst.* 129.

BY THE COURT.—BOCKES, J.—The motion at special term was to set aside a judicial sale, made under a judgment of foreclosure.

The motion was denied. On appeal to the general term, the order was affirmed. An appeal was then taken to this court from the order of affirmance.

The motion now is to dismiss the appeal, as I understand it, on two grounds: 1. That the order is not appealable, because not falling under any of the subdivisions of section 11; and 2. Because the granting or refusing of the order was in the discretion of the court below.

I think the order comes within the purview of subdivision 3 of section 11.

The appeal is from an actual determination of the general term, and is a final order affecting a substantial right, made upon a summary application, in an action after judgment. It plainly answers each of these requirements.

But it is insisted that it is not a final order.

It denied the motion, and ended the proceeding. Nothing further could be done in the proceeding. It closed finally the summary application, and consequently was a final order, and no right remained to the party except to appeal. So, I think the order would have been equally final, had the motion been granted instead of refused. It would, in that event, be complete and final as to the application: the judgment of the court on the merits of the application.

Whichever way decided, it was final in the sense of a final adjudication. A *final* judgment means a judgment which concludes the parties, as regards the subject matter in controversy in the tribunal pronouncing it, whichever way the decision may be given. It is called final in contradistinction from interlocutory. This is the view taken by this court in Buffalo Savings Bank *v.* Newton, 23 *N. Y.* 160. In that case the sale was set aside, and DENIO, J., says: "The order was final within the meaning of section 11 of the Code." All the judges concurred.

But notwithstanding all this, if the order rests purely in the discretion of the court, the appeal will for that reason be dis-

missed. And this brings us to examine the cases cited by the respondents' counsel on this motion.

In the last case cited (Buffalo Savings Bank *v.* Newton, 23 *N. Y.* 160), the appeal was dismissed. Judge DENIO says, notwithstanding the order fell directly within the provision of subdivision 3 of section 11, still "it rested purely in the discretion of the court to grant or refuse."

On looking into that case it will be seen that the motion was addressed to the favor of the court, and was not urged as a matter of legal right. No irregularity even was suggested, but the party asked a favor, and hence the granting or refusing it was purely discretionary.

In Dows *v.* Congdon, 28 *N. Y.* 122, a resale was ordered, and also a reference was directed to ascertain the value of the land without improvements, with a view to further action in the case. The appeal to this court was dismissed on the ground that it was not final; all the judges concurring.

Even Judge EMOTT, who dissented on other grounds, concurred in this. In this case Judge WRIGHT well remarks and notes the true distinction now before us, that the granting of such an order (an order setting aside a judicial sale), when it involves no question of strict legal right, is within the discretionary power of the court below, and not appealable; clearly, and, as I think, very justly implying, that if the motion rested on facts giving a strict legal right to demand it, the order would be appealable.

In Wakeman *v.* Price, 3 *N. Y.* 334, the sale was set aside. It was decided that an appeal would not lie, because the sale was in all respects regular and fair, and the motion was, as the case states, addressed to the favor of the court; hence, purely discretionary. The case of Hazleton *v.* Wakeman, 3 *How. Pr.* 457,* was similar to Wakeman *v.* Price, in all respects.

So it seems that the four cases on which the motion before us is based fail to give it support, unless this case, like those cited, was before the supreme court as a matter of pure discretion, not involving a question of strict legal right.

This is the rule laid down by Judge WRIGHT, in Dows *v.* Congdon, and is unquestionably sound.

* No written opinion was delivered.

So in Tripp *v.* Cook, 26 *Wend.* 143, the same distinction was marked, and it was then said, in substance, that an order which gave effect merely to the will of the judge was one resting in pure discretion. Not so, however, when a case was made for the application of legal rules and principles of equity.

It now remains to be seen whether the case before us does involve a strict legal right. If it does, the appeal is properly taken.

The party claimed that he had been defrauded at the sale; that it was unfairly and unjustly conducted to his injury; and he alleged that the plaintiff and purchaser approached bidders and dissuaded them from bidding; that they need not bid, for the plaintiff would outbid them, and intended to bid it in; and that such persons as wanted to purchase, could buy on more advantageous terms of the plaintiff; and thus discouraged and prevented bidding. The motion was, therefore, grounded on fraud, and thus became a strict legal right.

If the charge of fraud should be sustained, the party was entitled to have the sale vacated—not as a matter of favor, but as a matter of right; and he could have maintained a direct action in equity to set aside the sale, instead of proceeding by motion.

The case of Tiernan *v.* Wilson, 6 *Johns. Ch.* 411, and of Clowes *v.* Dickenson, 5 *Johns. Ch.* 235, afterwards in the court of appeals, 9 *Cow.* 403, are full on this point. See also Cantine *v.* Clarke, 41 *Barb.* 629. So it seems that fraud in conducting a judicial sale gives a party a right of action, which may be enforced in a suit instituted for that purpose. This proves it to be a strict legal right, and it follows that a motion to set aside a sale for fraud involves such right, and it is not therefore discretionary.

This appeal should not, therefore, be dismissed on the ground that the motion was addressed to the favor of the supreme court.

This view is in strict conformity with the rule stated by Judge WRIGHT, that the granting of such an order, when it involves no question of strict legal right, is within the discretionary power of the court below, and not appealable.

It is next urged that the appeal in the case under subdivi-

sion 3 of section 11 is controlled by section 331, which requires the appeal to be taken "within two years after the judgment shall be perfected by filing the judgment roll."

The appeal in this case was not within the limitation above specified, unless we either regard the roll incomplete until the order granted on the motion, and also the order of affirmance at general term was attached and made part of it; or unless we regard the order appealed from as a final order in the nature of a judgment.

It was said in Bank of Genesee *v.* Spencer, 18 *N. Y.* 152, that this class of orders rested on the assumption that the judgment was valid, and the proceeding in such case was based upon it; which proceeding itself might terminate in a final order in the nature of a judgment. This, it seems to me, is a sensible construction to put on this class of orders. The proceeding is a new and irregular one, and demands an adjudication of a new question on new facts occurring after the entry of judgment. As regards these facts, and the adjudication upon them, the final order (as Judge PRATT says) is in the nature of a judgment. In this view, the appeal is in time.

Nor can we now, on this motion, pass on the merits of the application. It is true, the court, at special term, held that the party failed to make a case of fraud entitling him to the relief he sought, and the general term came to the same conclusion But the appellant insists that the supreme court was in error in that determination, and demands that it be corrected by this court. This question will be determined when the appeal shall be heard on the merits. In that regard, it is enough that the party made a case requiring the application of legal or equitable principles to its determination.

The motion to dismiss the appeal is denied.

A majority of the judges concurred.

Motion denied.

KINNE *v.* CITY OF SYRACUSE.

September, 1866.

Affirming 30 *Barb.* 249.

A statute altering the boundary of a city or other local division of the State, is unconstitutional and void, if its incidental effect would be to alter the boundary of an assembly district at any other time than upon the decennial enumeration of population.

The constitutional restriction (§ 5, art. 3) on the alteration of assembly districts, applies to the action of the legislature as well as to that of the supervisors.

This was a case agreed upon by Enos Kinne and the City of Syracuse, for the purpose of presenting for adjudication the question of the constitutionality of the 9th section of the act passed by the legislature on April 17, 1858. This act, by its title, purported to be "An act to amend the act to revise the charter of the city of Syracuse. The facts necessary to be stated, in order to present this question, are, that in 1857, the board of supervisors of the county of Onondaga, pursuant to the act passed in April of that year, requiring the formation of assembly districts, duly met and divided the county of Onondaga into three assembly districts. By this division the city of Syracuse formed a part of the second, and the town of Dewitt a part of the third assembly district; that town never having been at any time within the second district.

By the 9th section of the act of 1858, above alluded to, a portion of the city of Syracuse upon the easterly line of the city, and adjoining the town of Dewitt, was taken from the city of Syracuse and annexed to the town of Dewitt; or, in other words, the easterly boundary of Syracuse was changed by running a line which cut off from the city a territory about two miles in length and one in breadth, embracing from twelve to fifteen hundred acres of land, on which some two hundred and fifty persons resided, of whom fifty were voters, and annexed this territory to the town of Dewitt. This is the whole scope and purport of the section; and neither in the section nor in any part of the act, is any provision made in respect to the political *status* of the inhabitants of the exscinded and annexed

territory; nor how, if at all, they shall be reckoned in regard to any assembly district, or in what manner participate in the election of a representative for such district.

The plaintiff in this suit, at the time of the passage of the act, resided and still resides, within the territory thus set off, and owned real estate therein, subject to taxation. The authorities of Syracuse, subsequent to the passage of the act of 1858, caused a tax to be assessed upon his property within this district, issued a warrant for its collection, and levied upon and sold some property of the plaintiff to satisfy the tax. The ground assumed by them was that the law, by which this territory was attempted to be set off to another town and assembly district, was unconstitutional and void, and that consequently the territory still remained a part of the city of Syracuse, and liable to contribution towards its public burdens; and that was the precise point presented in this case.

The defendant claimed that section 9 of the act in question was in direct conflict with section 5 of the third article of the constitution. This section, after providing that members of assembly shall be apportioned among the several counties of the State as nearly as may be according to the number of their respective inhabitants, directs that the supervisors of the respective counties shall meet on a specified day, and divide their counties into as many assembly districts as they shall be entitled to by law, each assembly district to contain, as nearly as may be, an equal number of inhabitants, and to consist of convenient and contiguous territory. It is further provided in this section that the legislature, at its first session after the decennial enumeration, shall reapportion the members of assembly, and the boards of supervisors shall meet and divide their counties into districts as before, and then it is added, "*the apportionment and districts so to be made shall remain unaltered until another enumeration shall be taken under the provisions of the preceding section.*"

The supreme court, upon grounds substantially the same as those assigned by this court, in the following opinion, gave judgment for defendants. Reported in 30 *Barb.* 349. The plaintiff appealed.

Sedgwick, Andrews & Kennedy, for plaintiff, appellant;—Cited *L.* 1857, c. 63, tit. 5, § 22; tit. 6, § 1 *L.* 1858, c. 341, § 9; *Const.*, art. 3, §§ 1, 5; Bank of Chenango *v.* Brown, 26 *N. Y.* 467; People *v.* Morrell, 21 *Wend.* 563; Benson *v.* Mayor, 24 *Barb.* 255, 259; Tanner *v.* Trustees, 5 *Hill*, 121; Purdy *v.* People, 4 *Id.* 398; reversing 2 *Id.* 31; People *v.* Cowles, 13 *N. Y.* (3 *Kern.*) 350; *Exp.* Collum, 1 *Cow.* 550; 1 *Story Const.* § 424, 425; People *v.* Draper, 15 *N. Y.* 543; Sill *v.* Village of Corning, *Id.* 303; 2 *Clark & F.* 36; 21 *Penn.* 160; 11 *Id.* 70; 15 *N. Y.* 543; 18 *Id.* 67; *Sedgwick on Statute and Constitutional Law*, p. 482; Fletcher *v.* Peck, 6 *Cranch*, 128; Morris *v.* People, 3 *Den.* 394; Newell *v.* People, 7 *N. Y.* (3 *Seld.*) 109; Metropolitan Bank *v.* Van Dyck, 27 *N. Y.* 460; 5 *Mass.* 524–554; 6 *Id.* 401, 417; 12 *Id.* 252–257; 4 *Seld.* 4; Supervisors of Niagara *v.* People, 7 *Hill*, 510; 9 *Wheat.* 204; Metropolitan Bank *v.* Van Dyck, 27 *N. Y.* 428; Rumsey *v.* People (Schuyler County Cases) 19 *Id.* 41; Lanning *v.* Carpenter, 20 *Id.* 447; 1 *R. S.* 5 ed., 523, §§ 15, 16.

N. B. Smith, for defendants, respondent;—Cited *Sedgw. on Stat. & Const. L.* 382, 383; Supervisors of Niagara *v.* People, 7 *Hill*, 571; affirming 4 *Id.* 20; Warren *v.* Mayor of Charlestown, 2 *Gray*, 84, 100; 30 *Barb.* 364, 366; Decamp *v.* Eveland, 19 *Barb.* 81; Laning *v.* Carpenter, 12 *How. Pr.* 191; Lanning *v.* Carpenter, 23 *Barb.* 402; and affirmance, in 20 *N. Y.* 447; Rumsey *v.* People, 19 *Id.* 41; 6 *Cush.* 575, 578; 33 *Maine*, 587; Slavison *v.* City of Racine, 13 *Wis.* 398.

JAMES C. SMITH, J.—It is conceded that, by the operation of § 9 of the act of April 17, 1858, the constitutionality of which is challenged by the defendant, a strip of land, about one mile wide and two miles long, containing two hundred and fifty inhabitants, of whom fifty were voters, was transferred from the second to the third assembly district, in the county of Onondaga, as such districts were formed, by the board of supervisors of that county, in 1857. The question is, whether, by reason of such operation, that section is in violation of the injunction of the constitution, that the assembly districts, formed pursuant to its provisions, "shall remain unaltered until another enumeration." Art. III. § 5.

The section is claimed by the appellant to be valid, upon two grounds: 1. That the alteration of the assembly districts was not the principal or direct object of the section, but was merely incidental to the act of changing the boundary-line between the city of Syracuse and the town of De Witt; and, 2. That the constitutional provision referred to, is a prohibition upon the boards of supervisors only, and not a restriction upon the power of the legislature to alter the boundaries of towns and cities.

I am of opinion that neither of these grounds can be maintained.

First. The act altering the assembly districts is none the less repugnant to the constitution because it also changes the boundary line of the city. The general power of the legislature to change the boundaries of cities and towns is subject to to the injunction that assembly districts shall not be altered. The injunction is expressed in broad and explicit terms, admitting of no exception or evasion. Assembly districts shall "remain unaltered." That which the constitution says shall remain unaltered, cannot be lawfully altered, either directly or indirectly. Any other construction would annul the provision. Its prime object undoubtedly was to prevent the gerrymandering of assembly districts, from year to year, for partizan or other mischievous purposes. A similar object led to the adoption of the provision in the preceding section, that the senate districts should remain unaltered until the return of another enumeration. The object of each provision might be wholly defeated if the legislature were permitted to change the boundaries of cities, towns and counties, in such manner as to alter assembly and senatorial districts. If it becomes desirable to change a boundary line of a town or city, which is also a dividing line between assembly districts, the act adopted for the purpose should be so framed as to take effect at the next reorganization of assembly districts, or in some other mode consistent with the constitutional injunction under consideration.

Second. There is no merit in the position that the injunction is directed to boards of supervisors alone, and not to the legislature. As has been said, it is in the broadest terms. It applies to all bodies having power to alter assembly districts. It directs

that "the apportionment and districts so to be made shall remain unaltered." The apportionment mentioned is to be the work of the legislature exclusively, and, in that respect, it is clear that the mandate is addressed to that body.

But there is another consideration which is decisive of this point. The only power conferred upon boards of supervisors, respecting assembly districts, is the power to form them, at the time fixed in the constitution, and to reorganize them at such time as shall be prescribed by the legislature at its first session after each decennial enumeration. That duty being performed, the authority of the board of supervisors over the subject is at an end till another enumeration. They have no power of alteration in the interim. That power resides in the legislature alone, and to that body, therefore, the injunction is directed.

The judgment should be affirmed.

All the judges concurred, except HUNT, J., who dissented, and MORGAN, J., not voting.

Judgment affirmed, with costs.

KLUENDER *v.* LYNCH.

December, 1868.

Where a wife is in possession of a stock of goods, claiming them as her separate property, and doing business in her own name, creditors of her husband, who seize the goods on process against him, must prove her possession fraudulent.

The fact that the husband assisted in the business and that both labored to some extent for their joint benefit, is not conclusive evidence of fraud.

A husband may transfer money and personal property to his wife in payment of a debt due to her from him, if she have a separate estate with which she is authorized to deal as if unmarried.*

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* The acts of 1848 and 1849 did not enable a wife to convey direct to her husband, nor to make other conveyances formerly prohibited by special reasons of policy or convenience. White *v.* Wager, 25 *N. Y.* 328. But the wife may convey to her husband through a third person. Lynch

Kluender v. Lynch.

In a wife's action against the husband's creditors, for seizing such property, evidence that the husband contracted the debt for which the judgment was recovered, by false representations that he was not indebted, is not material or competent.

An exception expressed to be "to the several points charged by the judge, wherein the charge differs from anything contained in any of the exceptant's propositions or requests to charge," is too general and wholly unavailing.

A demand is not necessary before commencing an action by a wife against a sheriff, for wrongfully levying, upon her property, an execution against her husband

Adolphene Kluender sued James Lynch, sheriff of the city and county of New York, in the New York superior court, to recover the contents of the cigar store No. 78 Bowery (or the value thereof), which had been levied upon by the defendant, under an execution against Frederick H. Kluender, the husband of the plaintiff.

The plaintiff married F. H. Kluender in 1845, in Prussia; they came to this country about 1851, and always lived together subsequent to their marriage. The husband, soon after his arrival, commenced business in a small way, with very lim-

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v. Livingston, 6 *N. Y.* 422. Under the statutes of 1862, however, it is held that the common law rule that a wife cannot take by gift from her husband is abrogated. Rawson v. Pennsylvania R. R. Co., 2 *Abb. Pr. N. S.* 220; affirmed in 48 *N. Y.* 212.

Indeed, where the rights of creditors are not concerned, a gift of personal property, by a husband to his wife, may be sustained without the aid of the statutes for the protection of married women. Kelly v. Campbell, p. 492 of this vol.

It has been held both by the supreme court (Jaycox v. Caldwell, 37 *How. Pr.* 240) and the New York superior court (Peck v. Brown, 2 *Robt.* 119), that a husband may now, by a conveyance direct to his wife, as in the latter case, or by a provision for her benefit in an assignment in trust, as in the former, create an equity in her favor, which the courts may protect and enforce, even as against subsequent creditors. And to similar effect is Lockwood v. Cullin, 4 *Robt.* 129. See also Phillips v. Wooster, 36 *N. Y.* 412; S. C., 3 *Abb. Pr. N. S.* 475; Hunt v. Johnson, 44 *Id.* 27.

It was held in Wolfe v. Security Ins. Co., 39 *N. Y.* 49, that an insurance company who have consented to a transfer of their policy by a husband to whom it was issued, to his wife, cannot, after a loss, object to a transfer on the ground that husband and wife are incompetent to contract with each other. The wife's equitable interest must be protected.

ited means, and after various changes, he, prior to 1857, commenced business in the Bowery, with very little capital. From October, 1857, to June, 1858, Mrs. Kluender received from Germany four thousand six hundred and seventy-five dollars and ninety-one cents, of which she at different times let her husband have four thousand six hundred dollars. He enlarged and increased his business, by investing in it all of this money; with this capital he continued the business until a fire occurred, about the middle of January, 1861. All of the cigars and tobacco he had at the time of the fire were burned. Subsequent to that time, and down to May 1, 1861, he continued business in Houston-street, when a lease of the premises 78 Bowery was taken in the name of himself and wife, and from that time the business was conducted in the name of the wife.

The money with which she thus went into business was received by the husband from the insurance companies; he paid to her, in all, about two thousand dollars in money, cigars and tobacco. This embraced his entire property. Thereupon, the husband and wife reversed their relations; he entered into her employ, and received his eating and drinking and whatever necessaries he had. Of course, after this time, whatever was done by the husband was in the name of the wife. After the fire, while the husband carried on business in Houston-street, and on March 11, 1860, he bought a quantity of tobacco of Fatman & Cardozo, gave his note, on which the judgment was recovered, which was set forth in defendant's answer.

The court refused to allow the defendant to prove statements alleged to have been made by the husband, as to his not owing any person whatever, at the time he bought the tobacco of Fatman & Cardozo, and gave his note; and the defendant excepted to this ruling.

At the close of the evidence the defendant's counsel moved for a nonsuit upon five grounds.

This motion having been denied, and the ruling of the court excepted to, the defendant's counsel requested the court to charge the jury as follows:

I. If the jury believe the evidence of the plaintiff, that her husband was her servant in and about the business of the store 78 Bowery, and that she received and retained the advantages

and accumulations of his labors there, the plaintiff cannot recover.

II. If the jury believe the purchases for the store were made by the husband, and were paid out of the proceeds of the business of the store conducted as stated by her in her evidence, the plaintiff cannot recover.

III. If the jury believe that the plaintiff and her husband labored together in the store, and by joint efforts, added accumulations and cash to the store (which accumulations and cash have not been separated), the plaintiff cannot recover.

IV. If the jury find that the property belonged to Mrs. Kluender (the plaintiff), by her allowing the husband to manage and control it for her, and in devoting his time and labor to its accumulations, it became liable to pay his debts.

As to the preceding requests, the court refused so to charge, to which refusal the counsel for the defendant excepted.

V. In coming to a decision, whether the money paid to Kluender was a loan or gift, the jury are authorized to take into consideration the time of the alleged loan, and the circumstances attending that transaction.

The court so charged.

VI. If the jury find that the plaintiff loaned the money, in 1857 and 1858, to her husband, to enable him to enlarge and extend his business, and he did so use it, he could not, after obtaining the credit from the judgment creditors, for which the execution was issued, so transfer it as to relieve it from the claims of the creditors referred to.

VII. As against the creditors of the husband, no valid transfer of the property or proceeds could be made to the wife. The *title* would not pass so as to be recognized in a court of law.

VIII. While the statutes relating to the property of married women exempt her property from her husband's control, and from his debts while she retains it herself, yet when she places it under his control, and allows him to invest it in trade, the restriction no longer applies. As to his creditors, it is his property. She loses the benefit of the statutes, and the common law declares the creditors' rights.

IX. That the form of the property may have been changed does not alter the rule; as in the case of property substituted for

property which had been fraudulently transferred, the trust attaches to it.

X. Under the evidence the defendant is entitled to a verdict.

As to the five preceding propositions, the court refused so to charge, to which refusal the defendant's counsel excepted.

The charge of the judge, which was fully approved by the court on the present appeal was (with some condensation) as follows:

The first question which you are to determine is whether Mrs. Kluender, when she transferred the money to her husband in 1857 and 1858, intended to make a gift of it to him; or whether she intended to, and did in fact, create the relation of debtor and creditor, between herself and her husband. If it was designed as a gift, it having been accompanied by actual delivery, the money became absolutely his property, and there was no obligation on his part to repay it; it became subject to his control, and liable for his debts. If, however, it was a loan, if the intention of Mrs. Kluender, when she gave the money to her husband, was that it was to be a loan—she then had the right at any time to demand payment of it; and it was proper for him, notwithstanding he was at the time indebted to other parties, on such demand being made, to pay the money back to her. In considering this question, it is immaterial whether any security was given or not, the obligation was just as binding in law, notwithstanding a written security was not taken. In determining this question, it is proper for you to look at all the circumstances—the length of time since the money was transferred, without any demand being made by her for its payment, and also the fact that no written security was taken. You are to look at the circumstances, not as conclusive, but as facts proper for your consideration in determining the question whether this was a loan or a gift.

If you shall come to the conclusion that that this was a debt due by Kluender to his wife, then, as I have already said, it was proper that he should pay it back when she demanded it, and his other creditors had no right to object.

The next question for you to determine will be whether Mrs. Kluender did, in good faith, embark in business at No. 78

Bowery, on the May 1, 1861, with her own property. The act of 1860, which confers very unusual rights upon married women, authorized her to engage in any trade or employment for her own sole benefit, as if she were a single woman. It not only authorized her to embark in business, but declares that she may sue and be sued in respect to such business to the same extent as if she were a single woman. I have no hesitation in saying that, by the act of 1860, it is entirely competent for a married woman to engage in any business, irrespective of her husband, and her property invested in such business is not subject to his debts. You are to decide whether she did so embark in business on her own account, with her own property, and for her own benefit. In determining this question you have a right to look at all the facts and circumstances in the case; —the fact that her husband assisted her in the manufacture of cigars, and in making the sales—that he made purchases for her, which were paid for out of the avails of the business, and that they labored together, to some extent, for their joint benefit. You are to satisfy yourselves, from the evidence, that the business was hers, and not her husband's, and that her embarking in business, in her own name, was not designed to cover up the property from his creditors. If it was a mere design or contrivance between them that she should embark in business, in her own name, for the purpose of keeping the property from his creditors, such a transaction would be void as against his creditors. If you shall come to the conclusion that the plaintiff made a loan of this money to her husband, that she demanded it back, that it was paid to her by him, and that, in good faith, she embarked in business on her own account, and for her own benefit, you will find a verdict for the plaintiff, and the remaining question will then be one of damages.

The counsel for defendant, as to the points on which requests had been submitted by him, excepted to the several points of the charge, *so far as the same differed from his requests.*

The jury found a verdict for the plaintiff for five hundred dollars, and the court directed that the exceptions be heard in the first instance at the general term, judgment in the mean time to be suspended.

Judgment was rendered overruling the exceptions, and the defendant appealed to this court.

Brown, Hall & Vanderpoel, for the defendant, appellant;—Cited Adler *v.* Mil. Pat. Brick Manu., 13 *Wisc.* 57; Nazro *v.* Merch. Mu. Ins. Co., 14 *Id.* 295; 1 *Rev. Stat.* 601, 602, § 2; 1 *Rev. Stat.* 766, § 17; Collomb *v.* Caldwell, 16 *N. Y.* 484; Wilson *v.* Robertson, 21 *N. Y.* 587; Candee *v.* Lord, 2 *N. Y.* 269, 274; Burtus *v.* Tisdall, 4 *Barb.* 571; Jarman *v.* Wooloton, 3 *T. R.* 618; Freeman *v.* Orser, 5 *Duer*, 476; Sherman *v.* Elder, 1 *Hilt.* 178; Hallowell *v.* Horter, 35 *Penn.* 375; Marsh *v.* Hoppock, 3 *Bosw.* 478; Cropsey *v.* McKinney, 30 *Barb.* 47; Vallance *v.* Bausch, 28 *Barb.* 633; Burger *v.* White, 2 *Bosw.* 92; Tripp *v.* Childs, 14 *Barb.* 85; Van Arsdale *v.* Dixon, *Lalor's Hill & Denio*, 358; Voorhees *v.* Trustees of Presb Church, 17 *Barb.* 103.

Cyrus Lawton, for the plaintiff, respondent;—Cited Merchant *v.* Bunnell (reported in this series, vol. 3); Buckley *v.* Wells, 3 *N. Y.* 518; Sammiss *v.* McLaughlin, 35 *Id.* 647; Sherman *v.* Elder, 24 *Id.* 381; Babcock *v.* Eckler, *Id.* 623; Merritt *v.* Lyon, 3 *Barb.* 110; 3 *R. S.* 225, § 4, 5 ed.; *L.* 1848 and 1849; *Id.* 1860, c. 90; *Id.* 1862, c. 172; Gage *v.* Dauchy, 34 *N. Y.* 293.

MASON, J.—When actions had names, this wou'd be known as an action of trover, brought to recover the contents of a cigar store, No. 78 Bowery, New York city. The plaintiff makes title to the property in virtue of her possession and apparent ownership. She is a married woman, and was carrying on business at that place, in her own name. Her husband, Frederick H. Kluender, was owing his wife, the plaintiff, for borrowed money, some six thousand dollars, and he, having been burned out, in order to pay her, made over to her in money, cigars, &c., some two thousand dollars, and with this she went into business in her own name and on her own acoount. Her husband assisted her and rendered some services in her business. The defendant is sheriff of the county of New York, and makes title to the property in virtue of a judgment and execution against Frederick H.

Kluender, having levied upon the property, as sheriff, in virtue of an execution placed in his hands against the said Frederick H. Kluender. The cause was tried before the court and jury, and was submitted to the jury in a charge unexceptionable, it seems to me. The plaintiff was in possession, doing business in her own name, and as against her, the husband's creditors, before they can claim to disturb her, must assume the responsibility of averring and proving her possession fraudulent. It was decided in this court, in the case of Gage *v.* Dauchy, 34 *N. Y.* 293, that where the legal title to property is in the wife as against her husband, it cannot be seized by his creditors to satisfy his debts, without proof that in the given case her title was merely colorable and fraudulent as against the creditors of the husband. It was decided in this court, in the case of Buckley *v.* Wells, 33 *N. Y.* 518, that, under existing statutes, a married woman may manage her separate property through the agency of her husband, without subjecting it to the claims of his creditors. That she is entitled to the profits of a mercantile business conducted by the husband in her name, when the capital is furnished by her, and he has no interest but that of a mere agent. That the application of an indefinite portion of the income to the support of the husband does not impair the title of the wife to her property, and that no interest in her separate property is acquired, either by the husband or his creditors, through the husband's voluntary services as her managing agent.

This case is in point, and disposes of much of the argument of the defendant's counsel. The defendants, in this case, sought and failed with the jury, and their verdict is conclusive in this court. The only questions reviewable on this appeal, are the judge's rulings upon questions of law.

The exception taken to the rejection of evidence offered by the defendant, as to the husband's statements, was not well taken. It was wholly immaterial to the issue on trial between these parties what Kluender might have said at the time he contracted the debt with the firm of Fatman & Cardoza, upon which the judgment was obtained on which the execution, levied by the defendants in this case, was issued. Besides, what he said to them at the time he contracted that debt was wholly

[illegible] His statements, upon no principle, can be given [illegible] against the plaintiff. The whole object of the question put was to show that Kluender stated he was not owing [illegible] of course, would embrace the plaintiff in this suit. The evidence was properly rejected. The defendant's counsel submitted ten distinct propositions which he requested the judge to charge, all of which, except the fifth, the judge refused. I have examined as well these requests as the charge itself and find no error in them.

The charge itself covered the whole case, and submitted the real issues in debate to the jury, and besides, there is no proper [illegible] taken exception to the charge. The case states at the end of the charge that the counsel for the defendant, as to the several points charged by the judge upon which requests had been submitted by him, excepted separately to such portions of said charge, so far as the same differed from the request made in that behalf. Where the charge contains several dist[illegible] propositions, and exception is taken to the charge genera[illegible] either proposition be sound and correct, the exception [illegible] unavailing. 1 *Seld.* 422; 3 *Id.* 266; 4 *Id.* 37, 67; 5 [illegible] *Kern.* 313. And so where the exception is to [illegible] charge and every part of it. 2 *Seld.* 233; 1 *Kern.* [illegible] so as to an exception to each and every part of th[illegible] *Kern.* 41[illegible]

The exception to the charge here, is still mo[illegible] The defendant has submitted ten requests to [illegible] over nearly three pages of the printed case. [illegible] cupies more than two pages, containing [illegible] and the exception is to the several points [illegible] wherein the charge differs from anyth[illegible] these ten propositions or requests to [illegible] and such an exception is wholly un[illegible] counsel seems to rely on the judge' [illegible] proposition reque[illegible] the def[illegible] if the jury find [illegible] plai[illegible] and 1858, [illegible] his busin[illegible] the cr[illegible] tion [illegible]

the creditors referred to." This proposition is not sound. It assumes that the husband could not pay money, or sell and deliver property to his wife, to pay her for such loan of money, in however good faith, or with whatever honest motives the same may have been done.

The position assumed by the defendant's counsel is, that that money loaned became pledged to the business, and that the creditors had an equitable lien upon it. I know of no such principle of law, and certainly the wife is not under any such disability growing out of her marital relation, that she cannot receive pay from her husband of money honestly loaned him, where the same is done in good faith. Babcock *v.* Eckler, 24 *N. Y.* 623. The case of Gage *v.* Dauchy, 34 *N. Y.* 293, holds, that the fact of the husband giving his attention and services to managing his wife's property, and assisting her in carrying on her business, does not deprive her of her legal rights in the property, or her first claim to the profits or funds of the business. This is all that is necessary to say in regard to the defendant's requests to charge, and the judge's refusal. There was no error committed in any of these refusals, and none committed upon the trial, and the judgment should be affirmed.

MILLER, J. [After briefly stating the facts.]—Several objections were made upon the trial to the refusal of the judge to charge the jury. It is insisted, that the court erred in refusing to charge, that, if the jury find that the plaintiff loaned the money, in 1857 and 1858, to her husband to enable him to enlarge and extend his business, and he did so use it, he could not, after obtaining the credit from the judgment creditors, for which the execution was issued, so transfer it as to relieve it from the claims of the creditors referred to.

It does not distinctly appear that the money was loaned for the purpose of enlarging and extending the business of the plaintiff's husband. It is true that his business was increased after the money was loaned, and the money was used for that purpose; and, assuming that there is evidence in the case from which such an inference may be drawn that such was the object of the loan, does it follow that the husband could not,

by transfer, secure the money thus loaned? Loans of money are often made for this specific purpose, and persons are frequently started in business by moneys advanced to enable them to obtain goods. The party loaning the money thereby becomes a creditor of the borrower, which entitles him to be secured or paid the same as any other creditor. It does not affect his rights as a creditor, because he loaned the money, and other creditors have trusted the party on the appearance of credit thus obtained. The borrower has the right to prefer the lender to his other creditors, and I am not aware that the law regards such a preference as unauthorized. It has not been held in this State, that such a loan was, of itself, a fraud as against creditors. If made with a view of diverting the property, or for the purpose of protecting it from creditors, who, on the faith of it, have given credit to the party, then, of course, it would be fraudulent, and the transaction could not be upheld. But the request made embraced no such proposition, and called upon the judge to charge a principle which, I think, was erroneous, and was therefore properly refused.

It is also insisted, that the court erred in refusing to charge, in accordance with the defendant's request, that, when the wife places money in the hands of, and under the control of, her husband, and allows him to invest it in trade for his own benefit, the property, as between the wife and the creditors of the husband, becomes liable for his debts, and that she loses the benefit of the statutes, and the common law declares the creditor's rights.

The difficulty in the proposition is, that it assumes that the the wife places the property in the hands of the husband and allows him to invest it in trade, while this does not appear as a conceded fact in the case. She merely loaned it to him with no specified object in view; and, as the jury have found that this was done in good faith, I do not see how such a loan can be considered as an improper diversion of the money, so as to render it liable for the debts of the husband. The request made was properly refused on the ground stated; but I am not prepared to hold that the wife cannot loan her individual money, even for the purpose of investing the same in trade, provided the loan be so restricted as not to connect her with

the husband's business. If she could loan it for one purpose, there is no reason, in my opinion, why she cannot do so for another, and unless she chooses to part with all control over it, or to become a partner in the transaction, she does not by such an act part with her rights which have been conferred upon her by statute.

So, also, the request to charge, to the effect that if the husband was the servant of the wife in and about the business, and received and retained the advantages and accumulations of his labor, then the plaintiff could not recover, was properly refused. This, with the additional requests made, as to the effect of purchases made by him, out of the proceeds of the business, and the accumulations made by their joint labors, and of allowing the husband to manage and control the property for his wife, and of devoting his time and labor to its accumulations, involve the question, how far the husband may be employed by the wife in the transaction of her business, when she has a separate estate, and is engaged in business on her own account. It has been repeatedly held, by this court, that there is nothing in the marital relation, which prevents the wife from employing her husband as her agent, in the management of her property and estate, and in the transaction of her business; and that such employment does not render her property, or the profits arising from her business, liable to the debts of her husband. Sherman *v.* Elder, 24 *N. Y.* 381; Knapp *v.* Smith, 27 *Id.* 277; Buckley *v.* Wells, 33 *Id.* 518; Gage *v.* Dauchy, 34 *Id.* 293; Merchant *v.* Bunnell.*

These cases show, that the wife's separate estate, and the profits derived from the same, although managed by the husband, as her agent, cannot be made liable for the payment of his debts. The principal question to be determined in such cases, is, whether the transaction between the husband and wife is fair and honest, and is not a mere contrivance designed fraudulently for the purpose of protecting the husband's property from his creditors. The judge, in his charge, fairly submitted to the jury to determine whether the plaintiff, in good faith, embarked in business with her own property, and charged, that, in determining the question, they had a right to

* Reported in this series.

consider the fact, that the husband assisted in the business, and in making sales; that he made purchases for her, which were paid for out of the avails of the business, and that they labored together to some extent, for their joint benefit. This, I think, was all which could be required, and covered the propositions last referred to.

There can be no question as to the right of the wife to employ the husband as her agent, and if there is any difficulty, it is in regard to the requests made, which related to the appropriation of the profits arising from the labors and services of the husband, to the benefit of the wife, and thus increasing, by the employment of his time and talents, the value of her property. This precise point has been substantially decided by this court.

In Buckley *v.* Wells, above cited, where the husband had acted as the agent of his wife, who furnished the capital, it was held, that the application of an indefinite portion of the income to the support of the husband, does not impair the title of the wife to her property, and that no interest in her estate is acquired either by the husband or his creditors, through his voluntary services, as her managing agent. CAMPBELL, J., fully answers the objection, that the skill and labor of the husband, when employed by the wife, enters into and forms a part of the property and increases its value, by remarking: "If the business is successful, granted; but the title is not thereby divested. At most he could have but a lien for wages."

In Gage *v.* Dauchy, 34 *N. Y.* 293, where the wife was the owner of a farm, on which she resided with her husband, and which he carried on in her name, without any agreement as to compensation, it was held, that neither the products of the farm, nor property taken in exchange therefor, could be attached by creditors, as the property of the husband.

The principles decided in the cases last referred to are fully indorsed and upheld by DAVIES, Ch. J., in Merchant *v.* Bunnell, *supra*. These cases effectually dispose of the question now discussed, and render it unnecessary to examine the authorities cited by the appellant's counsel, which, it is claimed, sustain a different theory.

The objection taken, that the agreement by which the hus-

band entered into the employment of the wife, on the terms stated by her, was a fraud upon creditors, cannot, I think, be maintained. It appears from the testimony, that he worked in her employment, sold and bought goods in connection with the wife and another person in her employ, and lived in the same building with his wife, and, he being insolvent, the wife provided for his support. The wife paid the workmen whom she employed to manufacture, and had everything under her control.

There was nothing in the manner in which the husband was employed, I think, which made the arrangement fraudulent on its face, and, within the authorities before cited, it can be sustained, provided it was not a device to cheat and defraud the creditors of the husband. Whether such was the case was a question of fact to be determined by the jury intrusted with the decision of the case. Knapp *v.* Smith, 27 *N. Y.* 277, 280.

It is said, that the transfer directly from the husband to the wife was void. It appears that the money and property were paid and delivered in payment of a debt claimed to be due from the husband to the wife, and I see no reason why such a payment and delivery of money and property is not valid and effectual. The husband merely paid the debt which he owed, and, as the plaintiff had a sole and separate estate with which she was authorized to deal as a *feme sole*, there is no good reason why she should not deal with her husband the same as with a stranger, and no occasion to require the intervention of a third party in the payment of her demand.

The defendant took the property wrongfully from the plaintiff, and no demand was necessary before the action was brought.

There was no error committed on the trial, and the judgment must be affirmed.

All the judges concurred.

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1. An action in the nature of replevin, brought by an assignee for the benefit of creditors, to recover damages from a sheriff, for the tortious taking of assets, does not abate by the death of the plaintiff. The cause of action survives by virtue of 2 *R. S.* 447. *Emerson* v. *Bleakley*, 23.
2. The proper parties to be substituted, in such a case, are the personal representatives of the deceased trustee, since the action relates to personal property. *Ib.*
3. But, if a successor in the trust is appointed, and he is substituted as plaintiff in the action upon the consent of the defendant, the defendant cannot afterwards avail himself of the objection that the action is not properly prosecuted by him as plaintiff. *Ib.*

APPEAL, 1; CONTRACTS, 8.

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2. In such a case, those to whom compensation is due are not restricted to a *mandamus*, as would be the case if the same were payable out of the assessments. *Ib.*
3. The determination of the assessors to impose a tax is a judicial determination; and an error therein, although it may be corrected by an appropriate proceeding, does not lay the foundation for an action at law by the person assessed, to redress the alleged injury. *Foster* v. *Van Wyck*, 167.
4. Where the plaintiff alleges facts entitling him to both legal and equitable relief, and demands both, the court may award either that is appropriate to the case made by the proof. *Johnson* v. *Hathorn*, 465.

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Under an order appointing *Joseph* G. as one of several commissioners, *James* G. took the oath of office and acted as such. *Held*, that the mistake being shown to be a clerical error, in the order, it was amendable. *Ganson* v. *The City of Buffalo*, 236.

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One who will keep a mischievous animal, with a knowledge of its propensities, is liable, without proof of negligence, to a person not a trespasser, who is injured by it. *Kelly* v. *Tilton*, 495.

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ANSWER.

VARIANCE, 1.

APPEAL.

1. After a sole plaintiff has assigned his interest in the subject of litigation to one of several defendants, and a decree has been made in favor of such defendant against the other defendant, an appeal cannot be maintained in the name of the plaintiff, for the benefit of the unsuccessful defendant; and such an appeal with the usual undertaking to stay proceedings is not effectual to stay the execution of the decree. *Hackley* v. *Hope*, 298.
2. A refusal to grant a temporary injunction against the collection of a tax, where but a small portion of the amount involved in the controversy can be affected at the time by such temporary injunction, is not an order which in effect determines the action, and prevents a judgment from which an appeal might be taken; and therefore an appeal does not lie from it to court of appeals. *Hasbrouck* v. *Kingston Board of Education*, 340.
3. If a motion for a temporary injunction is denied, not on the ground that the plaintiffs could ultimately have no relief, but because a temporary interference was not deemed advisable by the court to which the application was made, the court of appeals will not review the discretion of that court upon the question. *Ib.*
4. In order to sustain such an appeal, the papers should show that the motion was denied upon the ground that the plaintiffs could ultimately have no relief. *Ib.*
5. An appeal may be taken to the court of appeals from an order of the general term affirming an order of the special term denying a motion to set aside a judicial sale made under a judgment. *King* v. *Platt*, 527.
6. Such an order is final; it affects a substantial right; and it is an order made upon a summary application in an action after judgment. *Ib.*
7. Such an order is not purely discretionary with the court below, in such a sense as to prevent it from being reviewed. *Ib.*
8. An appeal in such a case is in time if taken within two years from the entry of the order. The order is in the nature of a judgment, within the meaning of the Code of Procedure. *Ib.*
9. Upon an appeal from a single judge of a court to the general term, security is not required except where it is desired to effect a stay of proceedings (Code of Pro. § 327); and under section 348,—which provides that such security must be renewed when required, as in case of an appeal to the court of appeals,—neglect to comply with an order to renew only terminates the stay, and does not affect the appeal. *Genter* v. *Fields*, 253.
10. An order of the court below, dismissing the appeal for such neglect, is not a matter of discretion, but affects strict legal right, and is appealable to this court. *Ib.*
11. A finding of a referee of the fact of notice that certain indorsements were accommodation indorsements, if based on the possession of the notes by the maker, and his delivery of them with such indorsements for his own benefit, may be regarded as a conclusion of law, and is therefore open to examination in the court of appeals. *Fielden* v. *Lahens*, 111.
12. On the argument of an appeal, the court may allow a defect in record evidence to be supplied. *Farmer's Bank of Washington County* v. *Cowan*, 88.
13. In an action on a contract for services, to recover compensation for part performance, the objection that the contract was entire, so that full performance must be shown, if not taken at the trial, is not available to defendant on appeal. *Jenkins v. Wheeler*, 442.

QUESTIONS OF LAW AND FACT; 2; REFERENCE.

APPLICATION OF PAYMENT.

ASSIGNMENT, 7.

ARBITRATION.

After a sealed submission to arbi

tration requiring a written award has been made, a verbal agreement of the parties to accept a verbal award, which the arbitrator accordingly makes, changes the submission to a verbal one; and if the matters be such as cannot be determined by a parol arbitration, the award is void. *French* v. *New*, 209.

ESTOPPEL, 3.

ASSEMBLY DISTRICTS.

CONSTITUTIONAL LAW, 1; STATUTE, 2.

ASSESSMENT.

CLOUD ON TITLE.

ASSIGNEE.

EVIDENCE, 6.

ASSIGNMENT.

1. One who had performed work for a municipal corporation under an agreement by which he was to be paid in orders on the general fund to be paid from the tax of a a certain year, afterward, for valuble considerations, gave orders on the comptroller of the city to pay the former orders, when they should become due, to certain third persons, and the latter orders, so drawn by the contractor, were presented to the comptroller and filed in his office. *Held*, that they operated as assignments *pro tanto* of the moneys due the contractor, and being payable from a particular fund to arise at a future day, were not bills of exchange, and need not be accepted to make the drawee liable. *Hall* v. *The City of Buffalo*, 301.
2. It is not necessary that the city should have specific notice that the orders were given for valuable consideration. Knowledge of the fact that the orders had been given, is sufficient to put the city on inquiry. *Ib.*
3. The holders of the orders may resort in the first instance to the city, to enforce their demands, without proving that the maker of the orders has become insolvent; for the making of the orders is an assignment *pro tanto* of the claim against the city. *Ib.*
4. An assignment for benefit of creditors is void if the debtor thereby prefers his landlord for rent of his dwelling, with intent to secure the occupation of the dwelling for himself and family, subsequent to the assignment, without further payment. *Elias* v. *Farley*, 11.
5. An assignment of partnership assets preferring individual debtors of the several partners, violates the statute in respect to fraudulent conveyances, and shows such a fraudulent intent on the part of the assignors as to render the assignment void. *Hurlbert* v *Dean*, 428.
6. The absence of evidence that there were such debts is insufficient to overcome the presumption of fraud in such an assignment. *Ib.*
7. One holding an executory contract for the sale to him of land subject to a mortgage, rendered services to the mortgagee upon an agreement that they were to be received as payment of their value on the mortgage. *Held*, that a grantee of the land, having also an assignment of the claim for the value of the services, was entitled to the benefit of the application of the amount on the mortgage, as against a subsequent assignee of the mortgage. *Hartley* v. *Tatham*, 333.

ATTORNEY AND CLIENT, 1; DEMAND, 2.

ATTEMPT TO COMMIT CRIME.

TRIAL, 12.

ATTORNEY AND CLIENT.

1. Attorney and client may agree that any costs to be recovered by the latter, in an action, shall belong to the former; and such agreement, being followed by recovery of judgment for costs, and an assignment thereof to the attorney, constitutes him the owner of the

judgment and prevents it being set-off against a debt due from the client in the judgment. *Ely* v. *Cook*, 14.

2. The client wished to compromise his action; and his attorney, to induce him to prosecute it, promised to make no charge for any of his services in the suit if he failed to to collect the whole amount of the claim. *Held*, that this was not a collateral undertaking or guarantee of collection within the statute of frauds; and was not void for want of a written memorandum. *Fitch* v. *Gardenier*, 153.

AWARD.

ARBITRATION; ESTOPPEL, 3.

BAILMENT.

PAYMENT, 1; RECEIPT.

BANKING.

In the settlement of the affairs of an insolvent banking association, nothing is to be repaid to stockholders until after payment of all the debts of the bank. *Hollister* v. *The Hollister Bank*, 367.

CARRIERS, 8.

BENEVOLENT SOCIETIES.

WILLS, 1.

BILLS, NOTES AND CHECKS.

1. Where A., an agent, at the request of B., his principal, gave his check to C. to discharge a debt from B. to C.,—*Held*, that if C. had a good claim against B., he could enforce payment of the check against A. *Fish* v. *Jacobsohn*, 133.

2. Inasmuch as it is no part of the business of a mercantile firm to make or indorse notes, as a firm, for third persons, there is no implied authority for one member to indorse or affix the name of the firm to negotiable paper, in which the partnership have no interest; and one who takes such paper, so indorsed, with notice that the indorsement was made for the accommodation of the one partner who made it, cannot hold the other partners upon it. *Fielden* v. *Lahens*, 111.

3. Plaintiff purchased a note from defendants, who were the payees therein, upon which he sued the makers, who set up the defense of usury. He served a copy of the summons, complaint and answer in that action upon defendants in this action, with a request that they assume the prosecution of that action, which they neglected or refused to do. It was referred, and tried, the defendants being sworn as witnesses on behalf of plaintiff. The referee reported in favor of the makers, upon which report judgment was perfected. Plaintiff paid the costs recovered against him, also those of his own attorney, and served a copy of the report and judgment upon defendants, demanding the amount of the note, the costs recovered against him by the makers thereof, and the amount of statutory costs paid his own attorney. *Held*,

1. That there was an implied warranty by defendants, on the sale of the note, that there was no legal defense to an action upon it.

2. That, having had notice of the defense interposed, and an opportunity to prosecute the action to judgment, they were estopped from showing, on the trial of the action upon such warranty, that the note was not in fact usurious.

3. That a *plaintiff* may avail himself of the right to cast the burden of an action upon his vendor, in the same manner as a *defendant*.

4. That the judgment upon the report of the referee was admissible in evidence against these defendants, and was as conclusive upon them as if the plaintiff had not consented to a reference of the action, but had tried the issues at the circuit before a jury.

5. That plaintiff was entitled to recover the several items claimed. *Fuke* v. *Smith*, 76.

INSURANCE, 5; MONEYED CORPORATIONS; NOTICE, 1; PAYMENT, 1.

BROOKLYN.

MUNICIPAL CORPORATIONS, 5.

BUFFALO.

The provisions of the charter of Buffalo, section 9 of title 8, *L.* 1853, p. 501,—requiring an application by the majority of property holders, in order to authorize an assessment for local improvements,—apply only to the improvements mentioned in that section, and do not apply to the other improvements mentioned by section 6 of the same title. *Ganson* v. *The City of Buffalo*, 236.

MUNICIPAL CORPORATIONS.

CARRIER.

1. A carrier, undertaking to carry goods at the owner's risk, is not liable for injuries arising from negligence, unless it be gross negligence, or at least, the want of ordinary care. *French* v. *The Buffalo & Erie R. R. Co.*, 196.
2. In the case of goods carried by railroad, it is not sufficient to prove that the injury resulted from a railroad accident, the causes of which are not explained, and which it does not appear affirmatively would have been prevented by the exercise of ordinary care and diligence on the part of the company and its servants. *Ib.*
3. A package of money addressed to "T.. cashier of the A. bank," is duly delivered, so as to discharge the carrier from liability, by delivering it to a clerk or receiving teller while he is acting behind the counter of the bank in discharge of his duties as teller, especially when he had previously received a similar package which the bank had credited on their books accordingly. *Hotchkiss* v. *Artisans' Bank*, 408.

CASE.

A referee's report should be inserted in a case immediately after the testimony, and preceding the exceptions thereto; but an inadvertent misplacement of it may be disregarded. *Hurlbert* v. *Dean*, 428.

QUESTIONS OF LAW AND FACT, 2.

CAUSE OF ACTION.

ABATEMENT, 3; ACTION; CONTRACTS, 1; DECEIT; NEGLIGENCE, 1; PARTIES, 2; PROMISE, 1.

CERTIFICATE

EVIDENCE, 13.

CHALLENGE.

ERROR; TRIAL, 1.

CHARTER.

BUFFALO; CONSTITUTIONAL LAW, 2; CORPORATIONS; MUNICIPAL CORPORATIONS.

CHATTEL MORTGAGE.

EXECUTION, 1.

CHATTELS.

DEMAND, 2.

CLOUD ON TITLE.

Where lands have been sold for the non-payment of an illegal assessment, an action to enjoin the delivery of a final declaration of sale or conveyance, and to have the assessment and sale canceled, does not lie, if, under the statute authorizing such sales, the declaration or conveyance must disclose the illegality in the assessment. *Howell* v. *City of Buffalo*, 412.

COLLATERAL SECURITY.

DEBTOR AND CREDITOR.

COMPLAINT.

PLEADING, 1.

COMPOUNDING OFFENSES.

FELONY.

COMPROMISE.

ATTORNEY AND CLIENT, 2.

CONFESSION OF JUDGMENT.

1. In the statement of facts in a confession of judgment under section 383 of the Code of Procedure, it is enough that the nature and consideration of the debt confessed, the time in which it accrued, and that it is due and unpaid, are concisely stated. The character and dates of particular items need not be given. *Gandall* v. *Finn*, 333.

The following are sufficient statements of the facts out of which indebtedness arose, to sustain a confession of judgment:—

"The defendant has, from time to time, borrowed of the plaintiff money, and there is now due to the plaintiff from the defendant the sum of fifteen hundred dollars for cash borrowed, for which the plaintiff holds the note of the defendant, bearing date the 12th day of November, 1860, and payable six months after date."

"The plaintiff has assumed for the defendant the payment of the sum of two thousand dollars, for which the defendant has given to the plaintiff two notes made by said defendant of one thousand dollars each; one payable sixty days from the 12th of November aforesaid, and the other in ninety days from said date." *Ely* v. *Cook*, 14.

CONSTITUTIONAL LAW.

1. The constitutional restriction (§ 5, art. 3) on the alteration of assembly districts, applies to the action of the legislature as well as to that of the supervisors. *Kinne* v. *City of Syracuse*, 534

2. The provisions of the charter of Buffalo requiring a city assessor to be appointed on each commission of assessment for local improvements, is unconstitutional; but this objection is not available to avoid the proceedings of a commission, if it does not appear that such appointment was made; and it seems that the unconstitutionality of the requirement does not make it illegal for the court in its discretion to make such an appointment. *Gunson* v. *The City of Buffalo*, 226.

MUNICIPAL CORPORATIONS, 6.

CONTRACTS.

1. Where the performance of work to be done is to precede payment, and is a condition thereof, the contractor, having substantially failed to perform on his part, cannot recover for his labor and materials, notwithstanding the owner has chosen to enjoy the benefit of the work done. *Harris* v. *Rathbun*, 326.

2. If the employer in a building contract refuses to perform on his part, and actually prevents performance by the contractor, it is unnecessary to prove readiness and ability on the part of the latter to perform in order to recover against the former. *Howell* v. *Gould*, 418.

3. Evidence of the insolvency of the contractor is immaterial, *Ib.*

4. An agreement between the vendor and purchaser of land by which the vendor guarantees the land shall sell, "within a year," for a stipulated price, and if not, he will pay the deficiency, does not bind the purchaser to hold the land, at that price, throughout the year. He may sell at any time within the year, even at auction, if in good faith. *Hakes* v. *Peck*, 387.

5. A contract to saw logs into specified sizes of lumber, in good and workmanlike manner, and to take and pay for all that the sawyer spoils in sawing, requires him to take and pay for only what is rendered unmarketable. *Harris* v. *Rathbun*, 326.

6. "Spoiled lumber" does not include what is merely sawed smaller than called for by the contract *Ib.*

7. On a subscription paper by which the subscribers are bound severally and not jointly, two subscriptions made at the same time, and by the same person, but one in his individual name, and the other with the addition, *Jr'r.* are separate contracts on which separate

actions will lie. *Erie & New York City R. R. Co.* v. *Patrick*, 72.

8. Hence the pendency of an action for the amount due in respect to one of those subscriptions is not ground for abating a subsequent action on the other. *Ib.*
9. The implied contract which is deemed to arise out of the acceptance of a charter by a municipal corporation, is a contract between the city and the State, and not between the city and individuals; and is not "impaired" by a statute exempting from liability for torts. *Gray* v. *City of Brooklyn*, 267.

APPEAL, 13; ATTORNEY AND CLIENT, 2; EXECUTORS AND ADMINISTRATORS, 1; INSURANCE, 3; MUNICIPAL CORPORATIONS, 2; PROMISE, 1; RECEIPT; SALE, 4; SHIPPING, 2.

CONTRIBUTION.

PAYMENT, 2.

CONVERSION.

EVIDENCE, 24.

CORPORATION.

A corporation chartered for the purpose of receiving and holding in trust property committed to them by bequest, &c., in trust for an unincorporated association, with power to execute any trusts confided in them by such association, may take a fund bequeathed to them to be expended under the direction and for the appropriate uses of a committee of such association.—Per FULLERTON, J. *Harris* v. *The American Bible Society*, 316.

BANKING; INSURANCE, 5; MONEYED CORPORATIONS; SALE, 3.

COSTS.

ATTORNEY AND CLIENT, 1; DEBTOR AND CREDITOR.

COURT OF APPEALS.

APPEAL, 11.

COVENANT.

An executory covenant, under seal, cannot be discharged by a parol arbitration. *French* v. *New*, 209.

ESTOPPEL, 1; FORECLOSURE.

DEATH.

1. An action cannot be maintained by a husband, as such, for damages to himself by being deprived of the society and assistance of his wife, resulting from her death, caused by the defendant's negligence. *Green* v. *The Hudson River R. R. Co.*, 277.
2. No such action could be maintained at common law, and the statute (*L.* 1847, 575, c. 470; same act, 2 *R. S.* 292), gives an action only to the personal representatives of the deceased, for the benefit of the widow and next of kin, and not to the husband, where the deceased wife could have maintained an action in conjunction with her husband, for an injury to her, if death had not ensued. *Ib.*
3. *It seems*, that the mere fact that the keeping, by defendant, of explosive substances within the city limits, in violation of a municipal ordinance, is not such a wrongful act as to render defendant liable, in damages, under the statute, for a death caused by the explosion of such substances, but that negligence or a common law nuisance must be shown. *Fillo* v. *Jones*, 121.
4. An action lies, under the statute, by the personal representatives, to recover damages for injuries causing death, without proof of resulting damages to husband, widow, or next of kin of the deceased. *Keller* v. *The N. Y. Central R. R. Co.*, 480.

DEBTOR AND CREDITOR.

Where a creditor recovers judgment on a collateral security for his

debt, and succeeds in collecting a part of the debt, it is proper to deduct from the proceeds a reasonable counsel fee, especially if attorney's fees were not included in the judgment, before applying the balance to the extinguishment of the principal debt. *Griggs* v. *Howe*, 291.
DISCHARGE, 1; MONEY PAID.

DECEIT.

One who uses words in a deceptive and double sense, for the purpose of deceit, is bound by them in the sense in which he used them. *Johnson* v. *Hathorn*, 465.
GUARANTY.

DEDICATION.

DEED, 3.

DEED.

1. A delivery of a deed to the agent of the grantee, to be held while he shall consider whether he shall accept it, is not a valid delivery. *Ford* v. *James*, 159.
2. Pending a negotiation for a conveyance, the grantor's attorney induced the grantee's agent to advance a trifling sum of money, and receive the deed, on an understanding that the deed should be returned and the money advanced be refunded, if the conveyance was not accepted. The grantee's agent caused the deed to be put on record, secretly, and returned the money to the grantor's attorney, representing to him that he had returned the deed to the grantor. *Held*, no delivery. *Ib.*
3. The purchaser of rural property, under a deed in which the grantor bounds the premises conveyed by a road or proposed road over land retained by him, is entitled to a right of way over such land; but to entitle him to have the road or street opened to the width indicated upon the grantor's map, it must have been accepted by the public, by formal opening or by user. *Fonda* v. *Borst*, 155.
2. A grantee who takes a deed expressed to be subject to a mortgage is not estopped thereby from showing that a part of the mortgage has been paid. *Hartley* v. *Tatham*, 333.
EVIDENCE, 2, 15; WILL, 2.

DEFENSES.

FORECLOSURE.

DELIVERY.

DEED, 2.

DEMAND.

1. A demand is not necessary before commencing an action by a wife against a sheriff for wrongfully levying, upon her property, an execution against her husband. *Kluender* v. *Lynch*, 538.
2. Assignees for benefit of creditors, who innocently and without notice take possession of chattels of which their assignor tortiously acquired possession, are not liable in an action by the true owner for their recovery, without demand and refusal. *Jessop* v. *Miller*, 449.
3. A demand should be made on each of several such assignees; but on proof of demand on, and refusal by, either one, plaintiff may recover against him, without proof of a demand on the other. *Ib.*
4. Where the owner of property, which came lawfully to defendant's possession, demands a delivery of more than he is entitled to, the defendant, if he refuses absolutely to deliver any, cannot afterward object that the demand was of too much. *King* v. *Fitch*, 508.
EVIDENCE, 24; INTEREST.

DEPOSITION.

An objection to the competency of a witness whose deposition is offered in evidence, is to be determined by the law as it stands at the time of the trial, not by the law as it was when the deposition was taken. *Fielden* v. *Lahens*, 111.

DEVISE.

WILL, 2.

DISCHARGE.

1. In proceedings for a discharge under the two-thirds act (2 *R. S.* 17, § 7), the omission to swear to the affidavit annexed to the insolvent's petition, before the magistrate, and to have it subscribed by him, prior to the granting of the order that creditors show cause, renders the discharge void for want of jurisdiction. *Ely* v. *Cook*, 14.
2. A due verification of the petition, subsequent to granting the order, does not cure the defect.

EJECTMENT.

EVIDENCE, 10.

ERROR.

Exceptions taken by the prisoner to proceedings on the challenge of a juror for cause, are not open to examination at his instance, on error, if he subsequently, by a peremptory challenge, excluded the juror. *Friery* v. *The People*, 215.

ESTOPPEL.

1. One who has covenanted with executors as such, that third persons shall satisfy and discharge a mortgage, is thereby estopped from denying the right of the executors to sue on such covenant, in their representative capacity. *Farnham* v. *Mallory*, 100.
2. In such an action, their interest in the enforcement of the covenant may be assumed. *Ib.*
3. The fact that one party, by consenting to a verbal award, induced the arbitrators to make such an award, does not estop him from objecting that the matters in controversy could not be determined by a verbal award. *French* v. *New*, 209.

BILLS, NOTES AND CHECKS, 8; DEED, 4; INSURANCE, 7.

EVIDENCE.

1. The contents of a document which has been lost or destroyed, without the fault of the party offering it, may be proved by secondary evidence, although such document be one, the genuineness of which, by reason of age, proves itself, without ordinary proof of its execution. In such a case the same principle of necessity which admits secondary evidence of its contents, allows proof, by testimony, of its general appearance and of its marks of antiquity. *Enders* v. *Eternberg*, 31.
2. It is not indispensable to the admission in evidence of an ancient will or deed without ordinary proof of execution, that possession in strict accordance with the terms of the instrument be shown, if such an account of it is given as may under the circumstances be reasonably expected and will afford the presumption that it is genuine. *Ib.*
3. Where, from the nature of the action, the defendant has notice that the plaintiff intends to charge him with the possession of a certain written instrument, or where the pleadings give notice to the opposite party to be prepared to produce a particular instrument, if necessary to contradict the evidence of the other party, no further notice to produce need be given, before secondary evidence may be received. *Howell* v. *Huyck*, 423.
4. A notice to produce papers for any purpose is sufficient to admit parol proof of any fact which their production would show,—*e. g.*, payment indorsed. *Ib.*
5. A witness who merely thinks he could give the substance, perhaps, of a lost document, is not competent to prove its contents. *Graham* v. *Chrystal*, 268.
6. Evidence that a mortgagee had admitted having knowledge that the consideration was illegal, after he took the mortgage, is not competent, as against an assignee of the mortgage. *Earl* v. *Chute*, 1.
7. Declarations made for the purpose qualifying the possession of property at the time of its sale,

are admissible in evidence. *Howell* v. *Huyck*, 423.

8. Declarations made by a husband at the time of giving his wife money, as to the purpose for which he gave it, and declarations as to the person for whom he was acting when he received a bill of sale made to his wife,—*Held*, competent testimony in favor of the wife, as part of the *res gestæ*. *Kelly* v. *Campbell*, 492

9. Declarations made while in possession of the estate, by an ancestor, since deceased, indicating the source of his title, and the fact that the one under whom he claimed had been in possession, may be proved by witnesses who heard them, as evidence against his heirs and devisees. *Enders* v. *Sternbergh*, 31.

10. In an action of ejectment in which there was such evidence of contradictory declarations, and the evidence was also conflicting as to whether the land in question was or was not included in a will and deed by a very general description,—*Held*, that the cause ought to be submitted to the jury, and that it was error to direct a verdict for defendant. *Ib.*

11. In the absence of any indication to the contrary, a statement made in the presence of the prisoner will be presumed to have been made in his hearing also. *Hochreiter* v. *People*, 368.

12. An act of a third person, done in the presence of the prisoner, is equally admissible as a declaration made in his presence. *Ib.*

13. The rule that where a public officer may be required by law to make a return of his acts, a return made by him may be used as evidence of the facts therein stated, does not make a mere official certificate of inspection required by law, evidence of the matters which the inspector therein certified he was satisfied of, when such matters are drawn in question by a stranger. *Erickson* v. *Smith*, 64.

14. The return of an execution unsatisfied and the appointment of a receiver are *prima facie* evidence of a want of assets. *Hope Mut. Ins. Co.* v. *Perkins*, 388.

15. A grant is not to be presumed on the ground of possession and the lapse of time, except when title has been shown, by the party who calls for the presumption, good in substance, but wanting some essential matter to make it formally complete, and where the possession has been consistent with the fact presumed. Evidence being conflicting as to the possession, it is error to direct the jury to presume a grant. Per HOGEBOOM, J. *Enders* v. *Sternbergh*, 31.

16. Whether, on an indictment for stealing bank bills, the fact that the bills had been paid and received as money is evidence of the existence of the bank and the value of the bills,—*Query?* *Fallon* v. *People*, 83.

17. In an action for damages, caused by the explosion of fireworks alleged to have been wrongfully kept by the defendant within the city limits, evidence that other fires had occurred from fireworks, at other times, and on the premises of other persons in no way connected with the issue, is inadmissible, at least without proof that the fireworks and the conditions of ignition were similar. *Fillo* v. *Jones*, 121.

18. The particular character of the fireworks on defendant's premises not having been proved, except that they were colored signal lights, bought of the maker at a specified time, evidence that red and green signal lights bought of the same maker two years afterward, were liable to spontaneous combustion, is inadmissible, in the absence of any other proof of similarity. *Ib.*

19. In such an action, proof that the fire marshal of the city had received an anonymous warning of the dangerous nature of defendant's establishment is inadmissible. *Ib.*

20. On the trial of an indictment for homicide, evidence of the violent conduct of the accused on the premises of the deceased, and his exhibiting there a weapon similar to that employed in the homicide, and declaring that it "would be the death of somebody here,"

shortly before the fatal affray, is admissible as tending to indicate personal hostility. *Friery* v. *The People*, 215.

21. Evidence of general usage admissible, to explain the term "spoiled lumber," if it can be deemed ambiguous. *Harris* v. *Rathbun*, 326.

22. In an action to avoid a sale for fraud, the evidence of fraudulent representations, to be submitted to the jury, need not be confined to representations made at the time of the sale, but may include statements made by the buyer long previous, where such statements led to the commencement of a course of dealing, of which the sale in question is a part, and where the buyer has never corrected such statements, but on further inquiry by the seller, has made similar representations. *King* v. *Fitch*, 508.

23. In a wife's action against the husband's creditors, for seizing her property, evidence that the husband contracted the debt for which the judgment was recovered, by false representations that he was not indebted, is not material or competent. *Kluender* v. *Lynch*, 538.

24. A refusal to deliver plaintiff's property to him upon demand, may be left to the jury as presumptive evidence of a conversion before the bringing of the action, although the demand was made after the papers in the action were delivered to the sheriff. *Jessop* v. *Miller*, 449,

APPEAL, 12; ASSIGNMENT, 6; BILLS, NOTES AND CHECKS, 8; CARRIERS, 2; CONTRACTS, 2, 3; EXCEPTIONS, 3; HUSBAND AND WIFE, 2; MONEYED CORPORATIONS; MUNICIPAL CORPORATIONS, 3; PRINCIPAL AND AGENT; PROMISE, 2; RECEIPT; SHIPPING, 4; STEAMBOATS; TRIAL, 11; WITNESS, 4, 6, 7;

EXCEPTION.

1. A general exception to the conclusions of a referee does not enable the appellant to object to the erroneous allowance of interest, There should be a specific exception. *Graham* v. *Chrystal*. 263.

2. An exception expressed to be "to the several points charged by the judge, wherein the charge differs from anything contained in any of the exceptant's propositions or requests to charge," is too general and wholly unavailing. *Kluender* v. *Lynch*, 538.

3. The rule that an exception to the admission of evidence cannot be sustained, unless the objection stated the ground thereof, does not apply where the evidence was improper, for obvious reasons which could not by any means have been removed. *Fillo* v. *Jones*, 121.

ERROR.

EXECUTION.

1. An agreement between a mortgagor and mortgagee of chattels composing the stock of a foundry, that the mortgagor might remain in possession after default, and carry on the works as the agent of the mortgagee, and that the latter would apply the proceeds of sales of the manufactured articles to the payment of the mortgage debt, is not as matter of law fraudulent; and manufactured articles belong to the mortgagee and are not subject to levy and sale on execution against the mortgagee, unless fraud in fact is established. *Farmers' Bank of Washington County* v. *Cowan*, 88.

2. To constitute a valid levy on personal property, as against the debtors or their assignee, under an assignment void for fraud as toward creditors, it is not necessary that the officer take manual possession or assume entire control. It is enough to visit the goods, exhibit the execution to the person in possession; declare a levy made, and note it on the execution. *Elias* v. *Farley*, 11.

3. Notice to the assignee is not essential. *Ib.*

DEMAND, 1; LEVY.

EXECUTORS AND ADMINISTRATORS.

1. A purchaser of land, in possession under an executory contract,

died, leaving his heir in possession; and after the purchase money fell due and was unpaid, the vendor rescinded the contract, and recovered judgment in ejectment against the heir, and then conveyed the premises to the heir. *Held*, that the heir acquired complete title; and that the land could not be reached by proceedings in the surrogate's court for its sale for payment of the debts of the deceased purchaser. *Goodwin* v. *Nelin*, 258.

2. Even if the heir obtained the conveyance by fulfilling the contract of the deceased, the land cannot be reached without an offer, on the part of the administrator or the purchaser at the administrator's sale, to perform, and a tender of the amount due. *Ib.*

ESTOPPEL, 1; HUSBAND AND WIFE, 4; WILLS, 3.

EXPLOSION.

EVIDENCE, 17; INSURANCE, 1; STEAMBOATS.

FACTOR.

PRINCIPAL AND AGENT.

FALSE RETURN

SEARCHES.

FELONY.

To avoid a mortgage on the ground that it was given to compound a felony, it should appear, 1. That there was an agreement to compound a felony; 2. That the mortgage was the result of that agreement; and, 3. That the mortgagee knew of the illegal consideration, at the time of taking the mortgage. *Earl* v. *Clute*, 1.

FORECLOSURE.

A breach of the covenant of seisin, like a breach of a covenant of warranty, is not, without eviction or disturbance, a defense to an action to foreclose a purchase money mortgage. *Farnham* v. *Hotchkiss*, 93.

FORMER ADJUDICATION.

A judgment recovered by a tenant in an action against a trespasser who justified under a void tax sale of the premises, is conclusive against the same defendant, on the question of the validity of the tax sale, when interposed in another action brought by the reversioner to recover for the injury to the inheritance. *Freer* v. *Stotenbur*, 189.

FRAUD.

1. The mere omission of one purchasing goods on credit, to disclose the fact that he is insolvent and unable to pay, is sufficient, without any affirmative representation, to render the purchase fraudulent and the sale void. *Johnson* v. *Monell*, 470.

2. In an action to avoid a sale for fraud, it is enough for plaintiff to tender at the trial the debtor's notes, without canceling them, unless he be asked to do so. *King* v. *Fitch*, 508.

ASSIGNMENT, 6; DEED, 2; EVIDENCE, 22; EXECUTION, 1; RATIFICATION, 2; WITNESS, 3.

FRAUDULENT CONVEYANCES.

ASSIGNMENT, 5.

GIFT.

Except as against creditors, a gift of personal property by a husband to his wife, is valid without the aid of the Married Women's Acts. *Kelly* v. *Campbell*, 492.

GRANT.

EVIDENCE, 15.

GUARANTY.

Defendant having agreed to transfer to plaintiff full paid stock, fraudulently induced him to accept stock that was, on its face, but half paid, with a deceptive and ineffectual guaranty. *Held*, that he was liable therefor in an action

for deceit. *Johnson* v. *Hathorn*, 465.
ATTORNEY AND CLIENT, 2; INSURANCE, 7.

HEIR.

EXECUTORS AND ADMINISTRATORS, 1.

HOMICIDE.

EVIDENCE, 20.

HUSBAND AND WIFE.

1. Where a wife is in possession of a stock of goods, claiming them as her separate property, and doing business in her own name, creditors of her husband, who seize the goods on process against him, must prove her possession fraudulent. *Kluender* v. *Lynch*, 538.
2. The fact that the husband assisted in the business and that both labored to some extent for their joint benefit, is not conclusive evidence of fraud. *Ib.*
3. A husband may transfer money and personal property to his wife in payment of a debt due to her from him, if she have a separate estate with which she is authorized to deal as if unmarried. *Ib.*
4. Plaintiff gave his bond to a third person for the benefit of his (plaintiff's) wife, and subsequently, on her death, was appointed her administrator. *Held*, in action by him, as administrator, to recover the bond, that he was entitled to its possession. *Halsted* v. *McChesney*, 310.

DEATH, 1; GIFT.

INDICTMENT.

Under 2 *R. S.* 649, § 63, and *L.* 1862, c. 374, § 8, an indictment for grand larceny in stealing money from the person need not aver that it was stolen in the night time; and a conviction may be sustained if property of any value is taken. *Fallon* v. *People*, 83.

EVIDENCE, 20; TRIAL, 12.

INFANT.

NEGLIGENCE, 2.

INJUNCTION.

APPEAL, 2.

INSOLVENCY.

DISCHARGE, 1.

INSPECTOR.

EVIDENCE, 18.

INSURANCE.

1. A provision in a policy of fire insurance, exonerating the company from loss by fire which should happen by explosion, must be taken to include an explosion of a steam engine insured by the policy, as well as any external explosion. *Hayward* v. *Liverpool & London Fire Ins. Co.*, 349.
2. The exception of fire caused by explosion, is not inconsistent with the fact that the engine itself was insured against fire. *Ib.*
2. The rule that in case of repugnancy between the written and the printed parts of the policy, the written shall prevail over the printed part, is not applicable in such a case. In such cases the inquiry always is, is there any repugnancy between the exception and the scope of the undertaking in the policy? If not, effect is to be given to both the written and printed parts, according to the ordinary rules of construction. *Ib.*
4. Under the act of 1849 (*L.* 1849, p. 239, c. 178), as amended by the act of 1857 (2 *L.* 1857, p. 171, c. 548), one who acts as agent of a foreign fire insurance association, in any city or incorporated village of the State, except the city of New York, must give bond for an annual accounting to the fire department, and payment of two per cent. of premiums, &c. *Fire Department of the City of Troy* v. *Bacon*, 127.
5. An insurance company, as inci-

dental to its general powers, and in the absence of any positive restriction, has a right to receive a promissory note from one of its trustees, as a part of a guaranty fund, and such note is a valid security in the hands of a receiver for the benefit of the company's creditors. *Hope Mut. Ins.* v. *Perkins*, 383.

6. The act of the company in undertaking business in another State under an act of the legislature thereof requiring other and special security, does not exonerate the signer of such a guaranty from liability thereon, at least in respect to policies not issued in such State. *Ib.*

7. The inducement held out to the public to insure, by reason of the security afforded by the guaranty, is a sufficient consideration, or furnishes the ground for an estoppel. *Ib.*

LIMITATIONS.

INTEREST.

On a claim for services, interest may be allowed without proof of a demand, when the debtor, by leaving the State, and having no fixed abode, prevented the creditor from making a demand. *Graham* v. *Chrystal*, 263.

JUDGMENT.

1. In an action against partners, a separate judgment may be entered against those who are found liable, while the defendant is nonsuited as to those who are not liable. *Fielden* v. *Lahens*, 111.

2. In an action upon a covenant of guaranty by which the covenantor became surety for the punctual payment of the bond of other persons, and undertook that, if default be made by them, he would pay and fully satisfy the mortgage mentioned in the bond, the judgment upon such default should not be that he should pay absolutely to the plaintiff the amount due, but that he should pay and satisfy, or cause to be paid and satisfied of record the mortgage mentioned, within thirty days from the date of the judgment, or in the event of his not doing so, then that he pay to the plaintiffs the amount. *Farnham* v. *Mallory*, 100.

ATTORNEY AND CLIENT, 1; BILLS, NOTES AND CHECKS, 3; CONFESSION OF JUDGMENT, 1, 2; EXECUTORS AND ADMINISTRATORS, 1; FORMER ADJUDICATION.

JUDICIAL ACT.

TAXES, 1.

JUDICIAL SALE.

If a referee, selling property under a decree, irregularly sells it free from a lien which he promises to pay off out of the proceeds, instead of selling it subject to the lien, as directed by the decree, the purchasers cannot be compelled to pay into the court the amount of the lien, in addition to their bid; but if the terms of sale were prejudicial to any party, the remedy is an application for a resale. *Hotchkiss* v. *Clifton Air Cure*, 406.

JURISDICTION.

DISCHARGE, 1; PARTIES, 2; TAXES, 1.

JURORS.

Ownership of real estate is not, under the act of 1847, a necessary qualification for jurors in the city of New York. *Friery* v. *The People*, 215.

TRIAL.

LARCENY.

INDICTMENT; VARIANCE, 2.

LEASE.

1. The lessor or reversioner, under a

lease of lands for agricultural purposes, has a right of action for the injury done to the inheritance by the wrongful removal of stone from a quarry on the lands. *Freer* v. *Stotenbur*, 189.

2. Such a lease, especially where it is accompanied by a license to the lessee to remove stone, yielding a share thereof to the lessor, does not pass to the lessee the right to work the quarry, as lessee, even though it be one that was opened and worked before the lease was made. *Ib.*

LEVY.

The test of a valid levy is whether enough has been done to subject the officer to an action for trespass, but for the protection of the execution. *Elias* v. *Farley*, 11.

EXECUTION, 2.

LIENS.

MORTGAGE, 2, 5.

LIMITATIONS.

On a promissory note given as a contingent guaranty, and payable according to assessments to be made after other assets are exhausted, the statute of limitations does not begin to run until that contingency occurs. *Hope Mut. Ins.* v. *Perkins*, 383.

MISNOMER.

AMENDMENT.

MONEYED CORPORATIONS.

Under the provisions of 1 *R. S.* 591, respecting moneyed corporations, a transferee of a note for more than one thousand dollars, which was on its face payable to such a corporation, and which was transferred without authority of the board of directors, cannot recover thereon against the makers, without proof that he took it in good faith, and for value. *Houghton* v. *McAuliff*, 409.

MONEY PAID.

One to the payment of whose debt money is applied which belongs to a third person, is liable therefor in an action by the latter, if he suspected and had reason to believe that it did belong to such person, and he parted with no value on the faith of the transaction. *Ely* v. *Norton*, 19.

PAYMENT, 2.

MORTGAGE.

1. After a railroad company had executed and recorded a mortgage of all lands, &c., it owned, or should acquire, in trust to secure bondholders, an agent of the company sold and conveyed land to the company. *Held*, that he must be deemed to have waived any claim to a vendor's lien for the price, against the mortgagees and those claiming under them. *Fisk* v. *Potter*, 138.
2. Of the two liens, accruing at the same time, the legal lien of the recorded mortgage must be deemed superior to the secret equity of the vendor. *Ib.*
3. *It seems*, that a vendor's lien cannot be upheld as equal to the claim of the purchaser's *bona fide* assigns without notice. *Ib.*
4. The breach of a collateral agreement to pay part of the consideration for lands sold, in another commodity than money, creates no lien upon the land. *Ib.*
5. A creditor by mortgage, who elects to make the whole principal due, for an alleged default in the interest, is not bound by the election, if the existence of a default is disproved; and hence a tender of the whole amount in such a case, does not, though refused, extinguish the lien of the mortgage. *Hartley* v. *Tatham*, 333.

DEED, 4; FELONY; FORECLOSURE; SHIPPING, 1.

MUNICIPAL CORPORATIONS.

1. The provision in the charter of New York city (*L.* 1857, p. 886, ch. 446, § 38), which allows, by a vote of three-fourths of the members elected to each board of the common council, work to be done for the city, without a contract,—only extends to work necessary to be done to complete or perfect a particular job, and not to work of a general character nor to a whole job or an original undertaking. *Haughwout* v. *Mayor, &c. of New York*, 344.
2. Even if that provision could apply to a whole job and an original undertaking, still, the vote of the common council must precede, and not follow the performance of the work; and a subsequent vote of the common council cannot cure the want of a precedent contract, nor give the party performing the work a claim to compensation. *Ib.*
3. Where the special duties of a comptroller of a municipal corporation are not defined by law, proof of his usage to receive and file notices affecting the indebtedness of the city is sufficient in an action against the corporation, to cast on them the burden of proof that his duties did not include the subject in question. *Hall* v. *The City of Buffalo*, 301.
4. After the right of a land owner to compensation from the city, for land taken for a local improvement, has become absolute, under a statute making the compensation a charge upon the city, a subsequent amendment of the charter, declaring awards for lands taken, to be payable within a specified time after assessments to be made upon the parties benefited by the improvement, cannot be applied retrospectively to take away the previously vested right of action. *Ganson* v. *The City of Buffalo*, 236.
5. Under a statute (Charter of Brooklyn, *L.* 1862, p. 203, § 39, amending *L.* 1854, p. 860, c. 384), declaring that a municipal corporation shall not be liable in damages for any nonfeasance or misfeasance, on the part of the common council, or any officer of the city, &c., of and duty imposed on them by the charter; but the remedy of the party shall be by mandatory proceedings against the city, or by action against the officer; no action lies against the city for damages for the non-performance of an obligation imposed by the act on officers of the city. *Gray* v. *City of Brooklyn*, 267.
6. Such an act is not unconstitutional, as impairing the obligation of contracts, or as conflicting with section 3 of article VIII. of the Constitution of the State of New York, which provides that all municipal corporations may sue and be sued, as natural persons. *Ib.*
7. That section of the constitution was intended to confer on corporations the capacity to be sued, not to define the cases in which suits may be maintained against them. *Ib.*
8. The words "this act," in section 39 of the amendatory act (*Laws of* 1862, p. 203), must be construed as referring to the charter of 1854, as amended, and not merely to the amendatory act. *Ib.*

ASSIGNMENT, 1; BUFFALO; CONSTITUTIONAL LAW, 2; CONTRACTS, 9; DEATH, 3; NEGLIGENCE, 1.

MUNICIPAL ORDINANCE.

DEATH, 3; NEGLIGENCE, 1.

NEGLIGENCE.

1. A person violating a public ordinance is a wrongdoer, and is necessarily negligent, and an innocent person injured by the illegal act is entitled to a civil remedy therefor. *Jetter* v. *The New York & Harlem R. R. Co.*, 458.
2. The rule that one who sues for damages for a personal injury sustained by defendant's negligence, must have been free from negligence upon his own part, applies where the person injured is an infant, the same as where he is an adult. *Honegsberger* v. *Second Ave. R. R. Co.*, 378.
3. The plaintiff allowed his son, six years of age, to go to and from school through the streets of a crowded city without a protector,

and the son was run over by the defendants. *Held*, that if the neglect of the boy to exercise the degree of care which an adult of ordinary prudence would use, contributed to the injury, the father could not recover. *Ib.*

4. In doing a lawful act where there are no present appearances of danger, every man has a right to assume that others will perform their duty and obey the law, and not bring injury upon him by its violation. *Jetter* v. *The New York & Harlem R. R. Co.*, 458.

5. In cases of negligence, if the facts are so clear and decided that the inference of negligence is irresistible, it is the duty of the judge to decide it; but when the facts, or the inference to be drawn from them, are in any degree doubtful, the only proper rule is to submit the question to the jury, under proper instructions. *Keller* v. *The N. Y. Central R. R. Co.*, 490.

ANIMALS; DEATH, 1, 3; MUNICIPAL CORPORATIONS, 5.

NEW YORK (CITY OF).

MUNICIPAL CORPORATIONS, 1.

NONSUIT.

JUDGMENT, 1.

NOTICE.

1. The fact that the maker of a note holds and puts it into circulation for his own advantage, is notice to the party taking it that whatever indorsements may be upon it were made for his benefit, and not in the course of business. *Weiden* v. *Lakens*, 111.

2. Notice of an unrecorded lien, after part payment of the purchase money, is not effectual against a purchaser, after a valid sale, who purchases under *bona fide* mortgagees who had no notice of the lien. *Fisk* v. *Potter*, 138.

ASSIGNMENT, 2; BILLS, NOTES AND CHECKS, 3; EVIDENCE, 3, 4; EXECUTION, 3.

NUISANCE.

DEATH, 3.

OFFICER.

EVIDENCE, 13; MUNICIPAL CORPORATIONS, 5; TRIAL, 5.

ORDINANCE.

DEATH, 3; NEGLIGENCE, 1.

PARTIES.

1. The payee of a check may maintain an action thereon, in his own name, although another person may be interested in the proceeds. *Fish* v. *Jacobsohn*, 132.

2. A court of equity does not assume jurisdiction on the ground of preventing a multiplicity of actions, where the cause of action is a single illegal assessment affecting numerous owners of distinct parcels of land whose interests are several, not joint. They cannot unite in one action merely to avoid the necessity of separate actions. *Howell* v. *City of Buffalo*, 419.

3. The objection that the judgment debtors are not joined as defendants in a creditor's action to set aside their assignment, is waived if not taken by demurrer or answer. *Hurlbert* v. *Dean*, 428.

ABATEMENT, 2; APPEAL, 1; ASSIGNMENT, 3; ESTOPPEL, 1.

PARTNERSHIP.

ASSIGNMENT, 5; BILLS, NOTES AND CHECKS, 2.

PAYMENT.

1. Plaintiff and defendant being liable, respectively, as maker and indorser of a note, on which, as between themselves, plaintiff, the maker, was indebted only for a part, plaintiff gave defendant a negotiable draft on a third person and his own note, together equaling his indebtedness, which defendant received, as expressed in

their agreement, "in full payment" of the note on which both were liable.

Held, that defendant was not thereby made bailee, or agent of the plaintiff, but became the principal debtor, and plaintiff was liable as surety only. *Freeland* v. *Van Campen*, 184.

2. Defendant having negligently failed to collect the draft, the parties agreed each to contribute to pay the note on which they were liable; and plaintiff, by defendant's authority, subsequently sued on the draft, and by compromise recovered a part thereof. *Held*, that plaintiff could recover of defendant the residue of the sum he had contributed to pay the principal note. *Ib.*

EVIDENCE, 4.

PLEADING.

1. In an action against an assignee for benefit of creditors, to recover property fraudulently bought of plaintiff by the assignor, and held by the defendant under the assignment, it is not necessary to aver any wrongful act on defendant's part in receiving the property, nor to aver a tender to the defendant of the notes or part payments received on the fraudulent purchase. *King* v. *Fitch*, 508.
2. Fraudulent representations made by an agent, are admissible under an allegation of fraudulent representation by the principal. *Ib.*

TRIAL, 11.

POWERS.

WILLS, 2.

PRINCIPAL AND AGENT.

After factors had informed their principals of the failure of a contract for the sale of the goods consigned, and of their having recovered possession of them at a distant place, and left them there with other agents of the principals for sale, the principals, for seven weeks after being fully informed of the facts, gave no intimation of objections, and did not communicate their intention to disavow the transaction until about eleven weeks after they were informed. *Held*, that these circumstances were sufficient proof of ratification. *Hazard* v. *Spears*, 353.

PRINCIPAL AND SURETY.

UNDERTAKING, 1.

PROMISE.

1. *It seems*, that one to whom a promise is made for the benefit of a third person, cannot, by releasing the promisor, defeat the right of action of such third person. *Hatch* v. *Prior*, 343.
2. If such promise was embodied in a written agreement, parol evidence of it is not admissible, without accounting for the absence of the writing. *Ib.*

QUARRY.

LEASE, 2.

QUESTIONS OF LAW AND FACT.

1. The question of negligence on the part of an attendant, upon the street, of a child six years old, in allowing the child to run in advance when the street was reasonably clear of vehicles and other causes of danger, is one for the jury. *Jetter* v. *The New York & Harlem R. R. Co.*, 458.
2. The question whether a party had title to certain property, is, as an entire question, a question of fact, although its solution may depend on questions of law. If an appellant would have the question reviewed in this court he must have the case so settled that the findings shall state the facts which raise the questions of law involved, and the conclusions of the court or referee thereon. *Farnham* v. *Hotchkiss*, 98.

SHIPPING, 4.

RAILROAD.

Where an injury is caused to a passer-by, by a defect in a railroad car, the company using the car at the time cannot escape liability by showing that the car was owned by and borrowed from another company. *Jetter* v. *The New York & Harlem R. R. Co.*, 458.

CARRIERS, 2; MORTGAGES, 1.

RATIFICATION.

1. To constitute the conversations and acts of the principals, with knowledge of the facts, a ratification, it is not material whether a ratification was contemplated or not. *Hasard* v. *Spears*, 353.
2. One whose property is obtained by a fraudulent purchase, and assigned by the buyer in trust for his creditors, does not necessarily ratify the title of the assignees by treating them as owners of the property, before he has had opportunity to obtain full knowledge of the fraud. *King* v. *Fitch*, 508.

RECEIVER.

1. The settled rule of the courts to allow to trustees only the same commissions as the statute allows to executors and guardians for similar services, is not applicable to receivers appointed by the court in actions pending therein. *So held*, of a receiver appointed to receive and apply rents, pending a controversy arising on the probate of a will. *Gardiner* v. *Tyler*, 247.
2. The court by whom a receiver is appointed has power to determine the rate of his compensation, and it may be fixed with reference to the circumstances of the case. *Ib.*

RECEIPT.

A receipt for a note, with the words, "which I agree to account for on demand," is not a contract of bailment, nor within the rule which excludes parol testimony to vary a writing, but is explainable as a receipt, especially by third persons. *Eaton* v. *Alger*, 5.

PROMISE, 1.

REFERENCE.

In an action at law, after the plaintiffs have closed their case, it is discretionary with the referees whether to allow them to open it and introduce evidence, not rebutting, but competent and proper, in the first instance, to make out their case; and their decision on this point is not subject to review on appeal. *Fielden* v. *Lahens*, 111.

RELEASE.

PROMISE, 1.

REMAINDERS.

WILLS, 2.

REPLEVIN.

ABATEMENT, 1; DEMAND, 2.

RETURN.

EVIDENCE, 13.

RIGHT OF WAY

DEED, 3.

SALE.

1. Under an agreement to deliver corn "in good merchantable *order*," the seller is bound to deliver corn of a merchantable *quality*. *Hamilton* v. *Ganyard*, 314.
2. *It seems*, that this is the meaning of such a stipulation; which should not be confined to condition, but extends to quality; but if this is not so, there is an implied warrant of quality in an executory agreement to sell, which is not excluded by a stipulation as to condition. *Ib.*
3. A *bona fide* purchaser for value,

from the president of an insolvent corporation, of property which he had purchased from the company for an antecedent debt due such president, is valid against the creditors of the company, although the sale by the company to the president was void as to such creditors. *Herry* v. *Kerr*, 359.

4. Under a contract for the sale of thirty thousand barrel staves, at a specified rate per thousand, to be delivered at a designated railroad depot,—*Held*, that delivery of seven thousand at the depot was sufficient to pass title, to all those so delivered, so as to divest the seller of any leviable interest, although the buyer had not seen them, and no count had been made to ascertain the amount to be paid. *Hyde* v. *Lathrop*, 436.
5. Upon the question of the validity of a sale made on condition as to payment, the condition not being performed, the intent of the purchaser to pay or not is immaterial, where no fraud is imputed to him, or where he testified that he had no intention of taking the goods; and it is not error to exclude an inquiry as to whether he intended to pay. *Jessop* v. *Miller*, 449.

EVIDENCE, 22; FRAUD, 2; PRINCIPAL AND AGENT; RATIFICATION, 2.

SAWING.

In an action by a sawyer to recover the contract price agreed to be paid for sawing lumber in a workmanlike manner, the employer may recoup damages for unworkmanlike sawing, although he has received the lumber, if he objected, at the time of receiving it, that the work was not well done. *Harris* v. *Rathbun*, 326.

SEAMEN.

SHIPPING, 2.

SEARCHES.

The owner of property who puts in a search for the purpose of obtaining a loan on mortgage, cannot maintain an action against the county clerk or searcher for a false return, in consequence of which the lender omitted to pay off an undisclosed incumbrance, and the property was subsequently sold on execution without the owner having actual notice of the incumbrance; since payment of the incumbrance would not be a necessary consequence of a correct return disclosing it. The clerk or searcher is not chargeable with damages, at the suit of the owner who parts with nothing of value by reason of the erroneous return. *Kimball* v. *Connolly*, 504.

SERVICES.

SHIPPING, 2.

SET-OFF.

ATTORNEY AND CLIENT, 1.

SHIPPING.

1. Where the *nominal* owner of a vessel executes a mortgage thereon to secure money loaned to the real owner, for the benefit of the vessel, the mortgage containing no covenant by the mortgagor to pay, he is not personally liable for the debt. *Jenkins* v. *Wheeler*, 445.
2. Where a master of a ship was engaged for the outward and return voyage, at a monthly compensation, and in consequence of unseaworthiness he abandoned the voyage at an intermediate port, and abandoned the ship to the insurers, he cannot recover wages for the time subsequent to his ceasing actually to serve as master. *Jenkins* v. *Wheeler*, 442.
3. The mere fact that a vessel is run on shares, by the captain, does not exonerate the owner from liability for supplies, purchased by the captain in the name of the vessel. *Kensel* v. *Kirk*, 500.
4. Proof of sale of the supplies to the captain, and that his name was

registered as such with the owner's in the registry of the vessel, casts the burden on the owners, to prove that the captain had the possession, command and navigation; and this is a question of fact. *Ib.*

STEAMBOATS.

STATUTES.

1. In a statute repealing a general law so far as it applied to a particular locality,—*Held*, that a proviso was local. *Fire Department of the City of Troy* v. *Bacon*, 127.
2. A statute altering the boundary of a city or other local division of the State is unconstitutional and void, if its incidental effect would be to alter the boundary of an assembly district at any other time than upon the decennial enumeration of population. *Kinne* v. *City of Syracuse*, 534.

CONTRACTS, 9.

STATUTE OF FRAUDS.

ATTORNEY AND CLIENT, 2; SALE.

STAY OF PROCEEDINGS.

APPEAL, 1, 9.

STEAMBOATS.

In an action for damages caused by a steamboat explosion, the certificate of the inspection of the vessel under the act of Congress of 1852, is evidence that the vessel was inspected; but is not evidence of the other matters relative to the vessel which are stated in it. *Erickson* v. *Smith*, 64.

SUBSCRIPTIONS.

CONTRACTS, 7.

TAXES.

1. Tax assessors having jurisdiction of the person and of the subject matter—that is, taxation of property—and invested by the statute with authority to decide what property is taxable and what exempt, act judicially in so deciding; and an assessment, though clearly erroneous in overruling a claim of exemption, is not void. *Foster* v. *Van Wyck*, 167.
2. It makes no difference whether the claim of exemption arises from State or national law. *Ib.*

FORMER ADJUDICATION; INSURANCE, 4.

TENDER.

EXECUTORS AND ADMINISTRATORS, 2; MORTGAGES, 5; PLEADING, 1.

TRESPASS.

A stranger who, without authority from the owner of premises, enters thereon for a lawful purpose, by invitation of one who is lawfully there by license of the owner, is not a trespasser. *Kelly* v. *Tilton*, 495.

TRIAL.

1. It is not a good cause of principal challenge, that a presented juror, from what he has heard or read of a particular transaction, has an opinion that a crime has been perpetrated by somebody. *Friery* v. *The People*, 215.
2. When such juror is challenged for favor, it is not proper to charge the triers that he may be biased by the opinion that a crime has been committed; but the triers should be instructed to determine the question according as they think the juror is impartial, and has no bias against the prisoner, or the contrary. *Ib.*
3. A juror, challenged for principal cause, testified that he had read of the transaction, had formed an opinion of it, not as to the guilt or innocence of the party charged, but that a party had committed the crime; and if the party were the prisoner he presumed him to be the guilty party; but had not actually formed an opinion that F. (the prisoner), was either innocent

or guilty of killing L. (the deceased). *Held*, that a challenge for principal cause was not sustainable. *Ib.*

4. Proper instructions to the triers of a challenge to the favor,—stated. *Ib.*
5. The mere expression of an opinion, by the officer designated by law to summon jurors, as to the merits of a cause that may chance to be on the calendar of the court for trial, or in respect to the guilt or innocence of a party under indictment, is not matter for challenge to the array. *Ib.*
6. The neglect of the officers of the court to pursue the directions of the statute in the mode of drawing and summoning jurors, is not, in the absence of any suggestion of fraud or of injury to a party, a ground of challenge to the array. *Ib.*
7. Where a party claims premises by two titles, either of which is good if available, he should be permitted to introduce evidence of both titles. *Enders* v. *Sternbergh*, 31.
8. Where, therefore, a party having proved title by deed, offered evidence of title to the same property by will,—*Held*, error to refuse to admit it, even though the title by deed was uncontroverted. *Ib.*
9. Where a question put to a witness on the trial is proper in part only, a general objection is not sufficient to make it error to admit it, but the particular ground of objection must be pointed out. *Hochreiter* v. *People*, 368.
10. An objection to an improper answer, given to a proper question, must be taken by motion to strike out. *Farmer's Bank of Washington County* v. *Cowan*, 88.
11. A party whose evidence is objected to for variance from his pleading, waives his right to require proof that the objecting party has been misled, if he does not insist upon it at the trial. *Griggs* v. *Howe*, 291.
12. Under an indictment framed under 2 *R. S.* 665, for shooting at A. with intent to kill her, and proof of shooting at B. with intent to kill him, and actually killing A., a request on the part of the prisoner to charge that he could not be convicted of shooting A., is too broad, and it is not error to refuse to charge accordingly. *Hollywood* v. *People*, 376.
13. In an action to recover specific personal property, the jury found for the plaintiff as to the one part, and for the defendant as to the other, designating the articles generically, without specifying them in detail. *Held*, that it was competent for the court to render the verdict certain by directing an amendment of the complaint, inserting therein a list of each class of articles intended by the generic designation of the verdict. *Emerson* v. *Bleakley*, 22.

NEGLIGENCE, 5.

TRUSTS.

The decision in Siemon v. Schurck (29 *N. Y.* 589, affirming 33 *Barb.* 9),—that if lands are purchased for the benefit of a minor, with money given by parents, and the deed, taken in the name of a third person, is made absolute in form without the knowledge of the minor or parents, a valid trust results in favor of the minor, notwithstanding the abolition of resulting trusts by the Revised Statutes—reasserted, and followed in a case where the absolute character of the deed was known to the parent. *Gilbert* v. *Gilbert*, 256.

CORPORATIONS.

TRUSTEES.

RECEIVER, 1.

UNDERTAKING.

1. The sureties in an undertaking given for the payment of such judgment as may thereafter be awarded in an action, are not discharged from liability on the undertaking by the fact that under a statute passed after the undertaking was given, the court awarded damages by way of costs, as a part of the judgment, which were not authorized by law at the time of giving the undertaking. *Herser* v. *Lyman*, 302.

2. The obligation of sureties in such an undertaking is to be interpreted by the law as it exists at the time they are called upon to perform it. *Ib.*

USURY.

A charge, in addition to interest, for trouble and expenses incurred by the lender in procuring the money to loan, is not necessarily usury. *Eaton* v. *Alger*, 5.

VARIANCE.

1. Under an answer alleging usury at a rate equivalent to about two per cent. a month, proof of usury at about four per cent. a month is a material variance, if the plaintiff be misled thereby. *Griggs* v. *Howe*, 291.
2. Indictment for stealing from the person: verdict, guilty, as charged, of grand larceny, in stealing from the person,—*Held*, not a variance. *Fallon* v. *People*, 88.

VENDOR'S LIEN.

MORTGAGES, 1, 8.

VENDOR AND PURCHASER.

CONTRACTS, 4; EXECUTORS AND ADMINISTRATORS, 1; MORTGAGES, 1, 8.

VERIFICATION.

DISCHARGE, 2.

WARRANTY.

BILLS, NOTES AND CHECKS, 3; SALES, 2.

WAY.

DEED, 8.

WILLS.

1. The provision of the *Laws of* 1860, 607,—that a testator leaving husband, wife, child, or parent, shall not devise to benevolent, &c. societies more than one-half his estate, &c.,—is peremptory, and may be insisted on by any person who would derive a benefit therefrom, although not one of the relatives designated in the statute. And the one-half is to be computed with reference to the estate at the time of the testator's death.—Per FULLERTON, J. *Harris* v. *The American Bible Society*, 316.
2. A testator devised all his estate, real and personal, to his wife and daughter, in equal shares, and giving each a power of testamentary disposition, unaffected by any trust or limitation; but imposed the restriction that, in case either died intestate and without issue, whatever might remain of the property was devised to the survivor.

   Held, that a joint conveyance, by the devisees of land so devised, with a covenant of warranty, passed all the title of the grantors, either vested or contingent; that such title was good, and the purchaser was bound to accept it; and no execution of the power of testamentary disposition, made after the conveyance, could have effect on the estate conveyed. *Freeborn* v. *Wagner*, 175.
3. Under a bequest to the widow, for life, of the interest on a specified sum, or so much thereof as the executors may deem necessary for her comfort, she is entitled to so much as is requisite to give security from want, and furnish reasonable physical, mental, and spiritual enjoyment. *Forman* v. *Whitney*, 163.
4. The fact that she is supported by a son, under an agreement to maintain her for life, does not excuse the executor's neglect to make regular and sufficient payments. *Ib.*
5. She is entitled to choose her own place of abode. *Ib.*

EVIDENCE, 2.

WITNESSES.

1. The surety in the undertaking given to obtain a provisional reme-

dy in an action, is not incompetent as a witness, for he is not a person for whose benefit the action is prosecuted or defended. *Jessop* v. *Miller*, 449.

2. A wife is not a competent witness in an action brought by her husband against a third person, for criminal conversation. *Hicks* v. *Bradner*, 362.

3. In seeking to avoid a sale of chattels on account of fraud, the fact that the seller would not have made the sale except for false representations, may be shown by the direct testimony of the seller, if he be a competent witness. This is not a matter of opinion, but the statement of fact within his personal knowledge. *King* v. *Fitch*, 508.

4. The question whether a railroad train stopped an ample time for all the passengers to get off, calls for an opinion on a matter not involving skilled testimony, and is improper. So of the question whether it was safer to discharge passengers in a station or before reaching it. *Keller* v. *N. Y. Central R. R. Co.*, 480.

5. Persons who have known nothing of a witness for eight or ten years prior to the trial, are nevertheless competent to impeach him by testifying that in former years his character was bad, and by testifying they would not believe him under oath; for no certain limit in point of duration can be laid down for such inquiries. *Graham* v. *Chrystal*, 263.

6. The deceased was a passenger on board defendant's steamboat when the boiler exploded, and seeing the steam rush into the cabin, she ran out, and her body was subsequently found in the water. *Held*, that a medical witness who had examined the body, and testified that the death was caused by drowning, might properly be asked, what would have been the indications if a person had been suffocated first, and afterwards had fallen into the water, although there was no evidence that this was the fact. *Erickson* v. *Smith*, 64.

7. The rule that the testimony given on a former trial, by a witness since deceased, is admissible in evidence, is applicable to the testimony given by a party to the action. *Emerson* v. *Bleakley*, 22.

DEPOSITION; EVIDENCE, 5.

ployer from effecting a sale at that price. *Ib.*

BROOKLYN.

A pier within the Atlantic basin, in the city of Brooklyn, is within the city of Brooklyn, although it be built on piles through which the tide ebbs and flows, and at a place not within the original low water mark. *Atlantic Dry Dock Co.* v. *City of Brooklyn*, 24.

JURISDICTION.

BUILDING ASSOCIATIONS.

Building associations formed under the act of 1851 have implied power to reserve interest upon loans made by them. *City Building & Loan Co.* v. *Fatty*, 347.

CARRIER.

RAILROAD COMPANY, 8.

CASE.

Where the case contains no finding of facts, an appeal to the court of appeals is not entitled to be heard. *City Building & Loan Co.* v. *Fatty*, 347.

APPEAL.

CAUSE OF ACTION.

ACTION, and TITLES there referred to.

CERTIORARI

1. The pendency of a certiorari to review the decision of referees upon an appeal in highway proceedings, does not suspend the right of the referees to enforce payment of their fees. Collecting the fees is not executing the order. *Disosway* v. *Winant*, 508.
2. The referees' claim for fees is assignable. *Ib.*

CHATTEL MORTGAGE.

One who gives a chattel mortgage, specifying no time of payment, to secure a debt overdue, has thereafter no leviable interest in the mortgaged chattels. The mortgagee becomes the absolute owner, and the interest of the mortgagor is merely the right to pay off the mortgage debt, and his possession is that of a bailee. *Baltes* v. *Ripp*, 78.

COLLATERAL SECURITY.

ASSIGNMENT, 1.

COMMISSIONS.

BROKER, 3, 5; TRUSTS AND TRUSTEES, 4.

COMPLAINT.

PLEADING.

COMPROMISE.

Where a compromise was made between A., B. and C., parties to an action, by which A. agreed to release his right to certain securities, as against B., but reserved his claims against all other persons,—*Held*, that in a subsequent action by A. against C. to enforce a lien on such securities, it was competent to prove that at the time of the compromise, it had been verbally agreed between A. and C. that A. should retain his legal claim to the securities, or the proceeds thereof, so far as they should come into the hands of C., as showing that C. had notice of the terms of the compromise. *Dorsheimer* v. *Nichols*, 519.

CONFESSION OF JUDGMENT.

1. In a confession of judgment, under section 383 of the Code of Procedure, the facts essential to be stated are the general facts out of which the debt arose, enough to identify the transaction and enable inquiries to be made. *Acker* v. *Acker*, 1.
2. Where a promissory note is stated, it is sufficient to state the consideration by giving the nature of the dealings out of which it arose, without giving all the particulars, such as the amount and time of loans or payments to the debtor's use, and the person to whom such payments were made. *Ib.*
3. In a confession of judgment it is

not necessary to state expressly the original amount of the indebtedness, for this may be inferred from the statement that the sum confessed is justly due, with data for precisely computing the amount of principal and interest respectively. *Clements* v. *Gerow*, 370.
4. The omission of a schedule, referred to in the statement as being annexed, does not make the judgment invalid. *Ib.*

CONTEMPT.

SUPPLEMENTARY PROCEEDINGS, 1.

CONTRACTS.

1. A dealer in arms agreed to pay an agent, for obtaining from the government an order for the purchase of arms, a share of the profit upon each delivery. *Held*, that subsequent modifications, by the government, of the terms of the order, did not amount to a new order, so as to release the obligation to pay further compensation for the agent's services. *Cummins* v. *Barkalow*, 479.
2. Such a contract is not necessarily void as against public policy. *Ib.*
3. In an action for breach of an executory contract of sale of goods exceeding fifty dollars in value, plaintiff produced a memorandum, signed by defendant, stating that "I have this day sold" designated goods, without stating to whom, and containing also the statement "for which I promise to pay said Abram *Falk* [defendant], the sum of," &c. A memorandum precisely similar, except that it was signed by plaintiff's assignor, the alleged buyer, and named Abram *Fulker*, as the payee, was also produced. *Held*, that these did not constitute a sufficient memorandum within the statute of frauds. *Calkins* v. *Falk*, 291.
4. An agreement, by an assignor of a mortgage, with his assignee, that on foreclosure of a prior mortgage covering the same and other premises, the decree shall contain a provision that the other premises be sold first, and their proceeds be applied to the prior mortgage, is not void, as a wager, nor as against public policy, if it be not shown that the relation of the parties interested in the fund was such as to render it inequitable. *Cowdrey* v. *Carpenter*, 445.
5. The equitableness of such an agreement may be presumed, in support of its validity, although the court ordered a sale in one parcel. *Ib.*
6. In such an agreement, a stipulation that if it be not performed the assignor is to pay the assignee, as liquidated damages, a specific sum (equal to the amount of the mortgage), is a stipulation for liquidated damages, and not a penalty. *Ib.*
7. In an action thereon, the damages cannot be reduced by showing that the property would not have sold separately for more than it sold for in one parcel; nor is it a defense that the promisor made an honest endeavor to secure such decision. *Ib.*
8. Plaintiff is not bound to tender a re-assignment of the mortgage before suing for the stipulated damages. *Ib.*
9. One who proposes to disaffirm a contract on the ground of fraud, which induced him to enter into it, must do so at once, upon the discovery of the fraud. *Bruce* v. *Davenport*, 333.

BROKER, 4; EVIDENCE, 5; PARTY WALL; SALE; VENDOR AND PURCHASER, 2; WAIVER.

CONTRACTORS.

MUNICIPAL CORPORATIONS, 1; RAILROAD COMPANIES, 2.

CORPORATIONS.

A corporation cannot evade liability on negotiable paper indorsed with their name by their agent, for the accommodation of a third person, on the ground that the agent had no authority so to indorse it, if it appear that the agent had frequently before indorsed their paper and procured it to be discounted by the plaintiff, and received the avails, and that the corporation had recognized the validity of such previous trans-

actions. *Bank of Auburn* v. *Putnam*, 80.

DEMAND.

COSTS.

APPEAL, 8.

DAMAGES.

CONTRACT, 6, 7; DEATH.

DEATH.

In an action under the statute, 2 *L.* 1847, p. 575, c. 450, for negligence causing death, the next of kin are not limited to nominal damages, although there be no positive evidence of actual pecuniary loss. *Dickens* v. *N. Y. Central R. R. Co.*, 504.

DEBTOR AND CREDITOR.

COMPROMISE; JUDGMENT, 3; PLEDGE; PRISONERS, 2; RECEIVER.

DECEIT.

In an action for deceit in the sale of a mortgage, under an allegation in the complaint that the mortgage was represented to be a good and valid security, proof of a representation that the mortgage was *bona fide* and well secured, and that the mortgagor had clear title, is admissible, in the absence of anything to show that defendant was misled to his prejudice by variance. *Craig* v. *Ward*, 454.

FRAUD.

DEED.

1. A deed described the premises conveyed as bounded by a line beginning at a point "on the bank" of a stream, thence going by courses and distances around the tract "to the said stream and down the stream as it winds and turns, to the place of beginning." —*Held*, that the words "to the said stream" must be construed to mean to the bank of the stream and not to the center. *Babcock* v. *Utter*, 27.
2. *It seems*, that a statement in a recorded deed, that it is made subject to a mortgage held by a third person, is constructive notice to all claiming under such deed, of the rights of the holder of the mortgage. *Campbell* v. *Vedder*, 295.

RECORDING DEEDS; VENDOR AND PURCHASER, 1.

DEMAND.

In an action against a railroad company for taking and converting ties, a demand at the office of the company, on the director under whose instructions the defendant's superintendent took the property, is sufficient. *Dunham* v. *Troy Union R. R. Co.*, 565.

DEMURRAGE.

RAILROAD COMPANY, 8.

DISTRICT COURT.

1. Under *L.* 1857, c. 344, § 50,—providing that when judgment in a district court of the city of New York "is rendered in a case where the defendant is subject to arrest and imprisonment therein, it must be so stated in the judgment and entered in the docket,"—the justice must adjudge that it is a case in which the party is subject to arrest, and the right to arrest must be stated in the judgment. The duty is judicial in its nature, and the statute is imperative, not directory. *Carpentier* v. *Willet*, 312.
2. Hence, if the right to arrest be not passed upon by the justice, he cannot on another day order execution to issue against the person; and an execution issued on such an order is void, and affords no protection to the officer. *Ib.*
3. The judges of district courts have no power to amend their judgments in anything requiring the exercise of discretion. Having rendered judgment, they are from that time mere ministerial officers. *Ib.*

DOWER.

An alien widow of a naturalized

citizen of the United States, although she never resided within the United States during the lifetime of her husband, is entitled to dower in his real estate. *Burton* v. *Burton*, 271.

EQUITABLE CONVERSION.

WILL, 5.

ESCAPE.

Whenever the process by which one is arrested is void, no action lies for his escape, for the creditor has no just ground of complaint that the person of his debtor is not holden in custody by it. *Carpentier* v. *Willet*, 312.

ESTOPPEL.

EXECUTION, 5; LICENSE, 2; PLEDGE, 2.

EVICTION.

VENDOR AND PURCHASER, 1.

EVIDENCE.

1. Arguments from inconvenience are entitled to just weight in establishing rules of evidence. *Brower* v. *Bowers*, 214.
2. In a husband's action to recover damages from defendant, for assisting his wife to leave him at her request, upon her complaint of ill-usage, the burden of proof is upon plaintiff to prove an unlawful motive or design on defendant's part. *Barnes* v. *Allen*, 111.
3. It is competent to ask a gas-fitter, examined as a witness, in an action for the price of gas *meters*, alleged to have been furnished to fulfill a contract for gas *fixtures*, whether gas meters are usually classified as gas fixtures. *Downs* v. *Sprague*, 550.
4. Parol evidence cannot be received to show that by such a general term as "nephews," the testator meant to include illegitimate nephews, unless it appears that there were no legitimate nephews, in which case the ambiguity would be explainable by parol evidence. *Brower* v. *Bowers*, 214.
5. A written contract cannot be varied by proof of a letter from one party to the other, of a prior date. *Coons* v. *Chambers*, 439.
6. The effect of a bill of sale transferring all the interest of the assignor in partnership property, without anything in its terms to indicate an intent to transfer only such assets as may be enumerated in an inventory, cannot be varied by the mere omission of an item from the inventory, nor by extrinsic evidence of the intention of the parties,—there being no question of fraud or mistake. *Cram* v. *Union Bank*, 461.
7. Evidence of a parol agreement that a chattel mortgage should not be immediately payable, is not admissible to vary its effect. *Baltes* v. *Ripp*, 78.
8. *It seems*, that when it appears that a paper inquired for is in the possession of a person who is out of the State at the time of trial, secondary evidence may be offered of its contents; although no search has been made for it in the State. Such proof relieves the party from proving that diligent search has been made. *Bronson* v. *Tuthill*, 206.
9. In an action for injuries to plaintiff's premises, a photograph of the premises, taken at the time they were in the condition in which they were put by defendant, is admissible. *Cozzens* v. *Higgins*, 451.
10. The admission by a party that an account examined by him was correct, is admissible in evidence against him, although made during a negotiation for settlement, and coupled with an offer to allow the account on a condition. *Bartlett* v. *Tarbox*, 120.
11. After the correctness of the items of an account has been proved, the account, and entries and vouchers concerning the items, are admissible. *Ib.*
12. One whose admission is adduced in evidence against him, has a right to have all he said upon the subject at the time taken together and, although the jury are not necessarily bound to give equal credit to all parts of an admission, it is not proper to instruct them,

in effect, that they may arbitrarily believe the fact admitted, and disbelieve the reasons for it. *Barnes* v. *Allen*, 111.

13. In an action against the indorser of a promissory note, where the defense was that the circumstances under which the plaintiffs obtained the note amounted to a payment of it by them, for the benefit of the maker, proof that the maker had previously declared that he would borrow money from the plaintiffs to pay the note,—*Held*, inadmissible. *Crounse* v. *Fitch*, 475.

14. The declaration of the maker of a note that the same is paid, not made at the time of the transaction which constituted the payment, nor made in the presence of the holder, should not be received. *Ib.*

15. A conversation between copartners, to the effect that they will make a profit by purchasing a certain note, directly followed by their advancing the amount of the note to the holder, is not admissible in their own favor, as proof of their intention in procuring the note, and to determine the character of the transaction. *Ib.*

16. In an action to charge a married woman's separate estate with money borrowed by her husband, upon notes made by her, and delivered to him for the purpose of borrowing it, his declarations that she borrowed it for the use of her separate estate, are not competent, in the absence of evidence that he was authorized to make such declarations. *Deck* v. *Johnson*, 497.

17. The circumstance that persons professing to be husband and wife, who emigrated hither from abroad, lived here in that relation for several years, and had children who were acknowledged as the issue of such a marriage, is sufficient evidence of a marriage, in fact, even though it may have the effect to invalidate a subsequent marriage. *Brower* v. *Bowers*, 214.

18. In an action for breach of promise of marriage, defendant's declarations that he would make a good home for plaintiff, are admissible as part of his conversations with plaintiff, relied on to establish the promise of marriage. *Button* v. *McCauley*, 282.

19. Under a general denial, in such an action, evidence that plaintiff drank intoxicating liquors to excess, although not competent as a defense, is admissible in mitigation of damages. *Ib.*

20. Any misconduct showing that plaintiff would be an unfit companion in married life, may be given in evidence in mitigation of damages. *Ib.*

21. If the plaintiff's intoxication was connived at by defendants, the burden of proof is upon plaintiff to show such connivance. *Ib.*

22. In an action by an attorney retained to conduct a cause pending in court, for compensation for the services employed, evidence that there were in fact no merits in the case he was engaged to present, is irrelevant. *Case* v. *Hotchkiss*, 324.

23. Nor is it material that an appeal, for the argument of which he made a charge, was not actually argued. *Ib.*

24. *It seems*, that evidence that defendant, as a militia officer, had commanded firing, and that one of the men had fired a gun charged with a ball, by which plaintiff was wounded, is sufficient to maintain an action, whatever precaution the defendant and his subordinates had taken to provide against the accident. *Castle* v. *Duryee*, 327.

25. Violent conduct of the prisoner in the presence of the prosecutrix, and immediately after consummating a rape upon her, is admissible in evidence on the trial of an indictment for the rape and for assault with intent to commit rape. *Conkey* v. *People*, 418.

26. On the trial of an indictment for rape committed on a married woman,—*Held*, that evidence of her husband's statements, made in her presence, on the day of the offense, were admissible in corroboration of her testimony. *Ib.*

27. Evidence of the character of the prosecutrix for chastity, must be confined to what is generally said of her by those among whom she dwells or with whom she is chiefly conversant. While reputation in

her immediate neighborhood is competent, reputation in a neighboring town is not. *Ib.*

28. In an action for trespass in entering and injuring plaintiff's building, when defendant attempts to justify his acts as having been necessary to protect plaintiff's premises from injury by excavations which defendant was making on his own land, evidence of the effect on plaintiff's premises, of the digging on defendant's own land, is admissible, in connection with the evidence of trespass on the plaintiff's premises. *Conces v. Higgins*, 451.

29. For the purpose of showing the value of household furniture at a given time, it is competent to prove for what it sold at a public sale three months afterward. *Cramer v. Fitch*, 473.

30. Such a lapse of time is not sufficient to justify the exclusion of the evidence; but if anything occurred in the interim materially affecting the value, it is competent for the adverse party to show it. *Ib.*

BILLS, NOTES AND CHECKS, 3; COMPROMISE; EXECUTION, 3; FORMER ADJUDICATION, 2; FRAUD, 6; HUSBAND AND WIFE, 3, 4; MORTGAGE, 4; NEW TRIAL, 2, 3; ROBBERY, 3; WAIVER; WILL, 1; WITNESS.

EXCEPTION.

1. An exception to the admission of a document in evidence does not avail if the ground of objection was not stated. *Brookfield v. Remsen*, 210.

2. In an action against a collecting agent for failing to have a note protested, whereby several indorsers were discharged, the judge ruled, in several distinct propositions, that evidence relied on by defendant in respect to each indorser, to establish a waiver of protest and notice, was not sufficient. *Held*, that a single exception did not bring up for review error in one of these propositions, the others being correct. *Cagblan v. Dinsmore*, 376.

EXECUTION.

1. The plaintiff, in an execution wrongfully levied on property exempt by law, is liable in damages therefor, if he was present at the levy, and referred the officer to his attorney for instructions, and the attorney directed the levy in his presence, even though he himself took no other part in the levy, and never received either the goods or the proceeds of the sale. *Armstrong v. Dubois*, 8.

2. A stipulation admitting that he gave no directions personally, and took no part in the levy, does not exonerate him. *Ib.*

3. The direction to levy execution upon a particular subject, being an incident to the obtaining payment of the debt by legal process, when a partner gives such direction while acting in the collection of a debt due the partnership, the presumption is that he had the countenance and assent of the other partner; and both are presumptively liable for the trespass, if the levy is wrongful. *Chambers v. Clearwater*, 341.

4. The officer's delay to take possession of goods he has levied on, until an order staying proceedings is dissolved, is not an abandonment of the levy. *Bond v. Willet*, 165.

5. The purchaser at a wrongful sale on execution, is thereby estopped from setting up, when sued for the conversion, that he acted merely as agent in the purchase. *Baltes v. Ripp*, 78.

DISTRICT COURT, 2; LEVY, 1.

EXECUTORS AND ADMINISTRATORS.

1. The will gave a house to an imbecile son of testator, and directed that an executor should have one thousand dollars per annum, and should occupy the house with the son, and pay the joint household expenses out of the bequests to the son. *Held*, that by the death of the son before the testator, the latter provisions became inoperative, and the court could not, in construing the will, award the executor a compensation

in money in addition to the one thousand dollars. *Downing* v. *Marshall*, 525.

2. The successors of a removed administrator, who were also interested in the estate as legatees, filed a petition before the surrogate, praying an accounting by their predecessor, and that he be ordered to pay over the amount found due. Nearly ten years having elapsed between the removal and the petition, the predecessor pleaded the statute of limitations. *Held*, 1. That there being no authority for a petition in the two characters of legatee and successor in administration, and the relief prayed being such as could only be given to persons interested in the estate as legatees, the proceeding must be deemed to be instituted by the petitioners in that character. 2. That, so regarded, it was barred by lapse of time. *Clark* v. *Ford*, 359.

3. The court will not direct assets to be retained to await disputed claims not in litigation, but leave the executors to protect themselves under the statute. *Downing* v. *Marshall*, 525.

4. A surrogate's decree against executors who are indebted to the estate of their testator, requiring them to pay legacies due from the estate, whether made before or after their removal from the executorship, is not, without payment, satisfaction of the legatee's claim against the estate, but the sums due remain undistributed assets. *Clapp* v. *Meserole*, 362.

5. An administrator with the will annexed, appointed on the removal of executors, may enforce a decree made on the accounting against such executors. *Ib.*

6. Legatees who are also executors, cannot, by assigning the legacy, give the assignee a right to enforce payment discharged from abatement for advances, or for assets misapplied, or debts due from them to the estate. *Ib.*

JUDGMENT, 6; WILL, 7.

EXTINGUISHMENT.

JUDGMENT, 3.

FALSE RETURN.

SHERIFF, 2.

FIXTURES.

WILL, 6.

FORECLOSURE.

CONTRACT, 4.

FOREIGN CORPORATIONS.

Foreign corporations are to be deemed "persons," within the meaning of a statute relating to taxation, unless a different intent is indicated by the statutes. *British Commercial Life Ins. Co.* v. *Commissioners of Taxes & Assessments*, 199.

INSURANCE, 6.

FORMER ADJUDICATION.

1. Where a former judgment was pleaded as an estoppel to proving certain facts in a subsequent case, and it appeared that in a former suit between the same parties, the existence of such facts had been set up at the trial, but it did not appear that any proof had been offered in support of such allegation of fact, nor on what grouud the defense rested, nor on what the verdict proceeded,—*Held*, that the former judgment was no bar to an inquiry into the same facts again. *Colwell* v. *Bleakley*, 400.

2. R. brought a suit against the present defendants and D., to set aside a sale in foreclosure, for fraud affecting the title under which the mortgage was given. While the action was pending, the present plaintiff bought the mortgage. R. afterwards recovered judgment that the sale was void for fraud in the mortgage. *Held*, that the report of a referee, and the judgment, in that action, were admissible on behalf of the plaintiff in the present action, which was to recover damages for fraud in inducing the plaintiff to buy the mortgage; and that they were conclusive on the defendant, as to the facts adjudged. *Craig* v. *Ward*, 454.

ACQUITTAL; JUDGMENT.

FRAUD.

1. An agent, employed to purchase lands at a tax sale, fraudulently purchased in his own name, and acquired the legal title, concealing the fact from his principals. He then made an executory contract to convey the land to the present plaintiff, reciting in the contract his personal knowledge that one parcel of the land was unoccupied, and stated that the title to that lot was therefore perfect; and, as to the other parcels, recited service of notice and expiration of time to redeem. *Held*, 1. That plaintiff could not maintain an action against him or for damages for fraud, it appearing that the principals, although aware of the facts for several years, had taken no measures to avoid the title claimed by their agent. 2. That proof of the falsity of those recitals which did not purport to be made upon personal knowledge, — without showing knowledge of the falsity on the defendant's part, or something equivalent, and plaintiff's reliance on the truth of the recitals,— would not sustain an action for fraud. *Comstock* v. *Ames*, 411.

2. A silent partner who did not know, nor assume to know, as to the truth of a statement of the condition of the firm made by one of his copartners, to a person who purchased an interest in the firm on the faith of such statement,— *Held*, not liable for damages to such person arising from fraud in the statement. *Chamberlin* v. *Prior*, 338.

3. Where a person makes a false statement, not knowing that it is false, but knowing facts sufficient to put him upon inquiry, he is liable for the consequences, to the same extent as if he had actual knowledge. *Craig* v. *Ward*, 454.

4. Although a purchase of goods on credit, by one who knows himself to be insolvent, is not necessarily fraudulent; yet where it is made with preconceived design not to pay, it is fraudulent; and this design may be inferred from circumstances,—such as soon afterward failing, without any intermediate cause, and making an assignment with unjust preferences. *Byrd* v. *Hall*, 285.

5. Where such circumstances are shown, the question of fraud should be submitted to the jury. *Ib.*

6. Upon the question of fraud in the purchase, it is admissible to prove the value of the assets transferred by the assignment. *Ib.*

7. It is also admissible to show that the assignment was fraudulent in fact, and that it was the intention of the buyer when he purchased, to assign and prefer fictitious claims in favor of his friends. *Ib.*

8. False representations made at the time of the purchase of the goods as to the settlement of former debts, and also statements as to the buyer's expectation of future ability to pay, are proper to submit to the jury on the question of fraud. *Ib.*

9. If the representation to one partner of what his associate would do if present, be deemed sufficient ground, within the rule respecting fraud, to avoid a contract of indorsement obtained thereby, the defrauded firm can not take advantage of it after having received and retained the proceeds of the contract, and been silent for nearly three months, until the insolvency of the maker occurred. They should, at once, when the real facts were made known to all of them, have tendered back the money received, and demanded a return of their note. *Bruce* v. *Davenport*, 233.

10. Where a party, having a cause of action to reform a written contract on account of fraud or mutual mistake, assigns the contract to another, himself and the assignee both acting under the same mistake as that under which he first entered into the contract, the assignee may maintain an action directly against the other original party to the contract, to have it reformed and specifically enforced. *Bentley* v. *Smith*, 126.

11. Fraud on the part of a debtor in inducing sureties to sign an undertaking, is no defense to an action by the creditor, against them, in the absence of evidence that he

was privy to the fraud. *Coleman* v. *Bean*, 394.

CONTRACT, 9; DECEIT; UNDERTAKING, 1; VENDOR AND PURCHASER, 5.

GAMING.

One who wins from a clerk, by gaming, the money of his employer, is liable to the employer in an action for money had and received. *Causidiere* v. *Beers*, 333.

HIGHWAYS.

1. The statute (1 *R. S.* 521) imposing penalties for encroachments on the public highways, applies only to such as have been *laid out* pursuant to the statute, leaving the case of highways established by prescription, to the common law remedy for nuisance. *Doughty* v. *Brill*, 524.
2. Where several appeals taken from the same order are heard together, the referees are entitled to but a single per diem compensation. *Disosway* v. *Winant*, 508.
3. Where several appeals are heard together, the appellants are jointly, not jointly and severally, liable, for the fees. *Ib.*

CERTIORARI, 1.

HUSBAND AND WIFE.

1. A stranger, in good faith, acting upon a wife's complaint of her husband's ill-usage, may lawfully aid and shelter her. *Barnes* v. *Allen*, 111.
2. It makes no difference that the assistance was not rendered till the day after the complaints were made. *Ib.*
3. In the husband's action, in such case, there is no presumption that the wife's complaints were unfounded. *Ib.*
4. The gist of an action by a husband for enticing away his wife is the loss, without justifiable cause, of her comfort, society and services. Plaintiff must give evidence, both that the loss was not occasioned by the voluntary act of the wife upon justifiable cause, and that it was occasioned by defendant without any real cause, and in bad faith towards plaintiff. *Ib.*

ACTION, 2; EVIDENCE, 10, 17.

INDICTMENT.

1. A conviction and sentence will not be reversed because the indictment purports to be found by twenty-four grand jurors, if objection on that account was not taken in the court below. *Conkey* v. *People*, 418.
2. An indictment under the statute (*L.* 1845, p. 285, c. 260, § 2), making it criminal for a person to advise or procure an abortion, is not bad for the reason that it states "that heretofore, to wit, at the time and place aforesaid, one A. was a pregnant woman, and that the accused, with the intent to produce miscarriage, did advise and procure of her *then and there to take* certain drugs," &c. The whole statement may be understood to relate to the same moment of time, and it sufficiently shows an advice and procurement at the time specified as the time of taking. *Crichton* v. *The People*, 467.
3. *It seems*, that under an averment in an indictment of recommending "Dr. James Clark's pills," evidence of the recommending of "Dr. Clark's pills" is not a variance. *Ib.*

INJUNCTION.

SALE, 4; TRADEMARK.

INSPECTION.

SALE, 9.

INSURANCE.

1. The receipt by insurers, through their general agent, of renewal premiums, taken by him with knowledge of other insurance on the same property, is a waiver of the requirement of the policy that formal notice of any such insurance must be given, and an indorsement made on the policy. *Carroll* v. *Charter Oak Ins. Co.*, 316.
2. Notwithstanding a provision in the policy, that no condition can

be waived, except in writing signed by the secretary, a condition may be waived by parol, by the general agent, acting within the scope of his agency, especially where the act can be regarded as ratified by the company. *Ib.*

2. The loss of a vessel insured should be deemed effectual and certain from the time the vessel was so injured that her destruction became inevitable; and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after such injury. *Duncan* v. *Great Western Ins. Co.*, 562.

4. Those who had an interest in the vessel, at the time of such fatal injury, may recover upon the policy, notwithstanding the fact of their having subsequently, and before the sinking of the vessel, made an assignment of their interest to others who were ignorant of the injury. *Ib.*

5. Securities deposited by an insurance company with the comptroller of this State, at the capital, in Albany, are taxable in the county where the company have their principal office or place of business within this State. *British Commercial Life Ins. Co.* v. *Commissioners of Taxes and Assessments*, 109.

6. A foreign corporation is liable to taxation on money invested by them in securities (other than United States stocks), which are deposited with the comptroller of the State, as a condition of their being allowed to do business as an insurance company here, as prescribed by the act of 1853, *L.* 1853, 893, c. 461, § 15; for it is money invested in their business, within the meaning of the act of 1855, *L.* 1855, 44, c. 87, § 1. *Ib.*

INTEREST.

ACCOUNT; MORTGAGE, 6.

INTERROGATORIES.

SUPPLEMENTARY PROCEEDINGS, 2.

ISSUES.

APPEAL, 4.

JUDGE.

JUDGMENT, 1.

JUDGMENT

1. A judgment attempted to be rendered by a judge, who is disqualified by reason of consanguinity with one of the parties, is utterly void, and incapable of being made good by any omission, waiver, or consent. *Chambers* v. *Clearwater*, 341.

2. In the absence of any special provision to the contrary, a judgment in an action against a debtor and the receiver of his estate, establishing a claim against the debtor, and directing the receiver to pay the same, simply determines the validity of the claim, and does not give it preference over other debts. *Clark* v. *Brockway*, 351.

3. A judgment does not extinguish the original claim on which it was recovered, if it was recovered, not against the principal debtor, but against one standing in the position of a surety. *Clapp* v. *Measerole*, 362.

4. The rule that the parties to an action, and all who are in privity with them, are bound by the judgment, applies as between co-defendants, or between defendants and those purchasing *pedente lite*, as well as between adverse parties. *Craig* v. *Ward*, 454.

5. A decree made upon a bill filed by a legatee in behalf of himself and all other legatees who might come in, &c., is not conclusive as against such other legatees, being infants, as did not actually come in and become parties to the suit. *Brower* v. *Bowers*, 214.

6. Consequently, the executor is still at liberty to contest the claim of such legatees, although it was declared established by the decree in that suit. *Ib.*

7. A judgment in a justice's court, in an action for trespass in entering plaintiff's land to abate an alleged nuisance, consisting in turning a stream of water on to defendant's land, is admissible, and, *if seems*, conclusive, in an action by defendant to recover damages for the nuisance, if both actions

involve the same issues. *Bowyer* v. *Schofield*, 177.
APPEAL, 1, 2; CONFESSION OF JUDGMENT, 1, 3; DISTRICT COURT, 1; FORMER ADJUDICATION; NEW YORK (CITY OF) 1; PLEDGE, 1; SUPPLEMENTARY PROCEEDINGS, 4.

JURISDICTION.

The actual line of low water mark on the Brooklyn side forms the boundary of territorial jurisdiction of the city of Brooklyn in that direction. *The Atlantic Dry Dock Co.* v. *The City of Brooklyn*, 24.

SERVICE AND PROCESS.

JUSTICE'S COURT.

1. In an action in a justice's court for injuries to real property, if the title of neither party is disputed, evidence given concerning title does not oust the justice of jurisdiction. *Bowyer* v. *Schofield*, 177.
2. The question where a stream ought to run does not necessarily involve title. *Ib.*

LEGATEES.

EXECUTORS AND ADMINISTRATORS, 2, 6; JUDGMENT, 5.

LEVY.

1. To constitute a valid levy on personal property, even as against a subsequent *bona fide* purchaser for value, it is not necessary that the officer take and retain manual possession. It is enough, if, when the property is in the view of the officer and under his control, he declares that a levy is made, and makes a memorandum thereof. *Bond* v. *Willet*, 165.
2. The rules as to a valid levy, on personal property, both as against the debtor and those claiming under him are, that,

   1. The property must be in the view and under the control of the officer.

   2. The officer must take possession, either by removing, or by an oral declaration that a levy is intended, and that the officer claims to hold the goods under such levy.

   3. An inventory, or, at least a memorandum of the levy, should be made at the time.

   4. Leaving the goods in the possession of the debtor until the sale, is at the risk of the officer but does not invalidate the levy. *Ib.*
3. To make a levy of an attachment on real property effectual, even as against a *bona fide* purchaser, it it not necessary that the sheriff should actually take possession of the property. *Burkhardt* v. *McClellan*, 263.
4. It is enough if he duly makes and returns an inventory, as required by the statute; and it is not essential for this purpose that he even go upon or see the land. *Ib.*

EXECUTION, 1.

LICENSE.

1. A parol license to do an act on the land of the licensor, given without a consideration, may be revoked at any time, even though the licensee, acting under the license, and with the knowledge and acquiescence of the licensor, has made valuable and expensive erections on the land, which would be useless to him in case the license were revoked. *Babcock* v. *Utter*, 27.
2. This is not a case for the application of the doctrine of equitable estoppel. *Ib.*

ADVERSE POSSESSION; SALE, 3.

LIMITATIONS.

1. Although, where there are successive owners of the cause of action for equitable relief, and the right to prosecute arises in the time of the first, the period of limitation commences at that time, and continues attached to the demand during the several subsequent changes of both; and when the statute period is elapsed, the demand is barred, though the last proprietor had recently acquired his right; yet, if the first legal proprietor of the claim is a trustee

having no interest, the cause of action (in this case the right to foreclose a mortgage) may be regarded as vesting in the *cestui que trust*; and if she were then under the disability of infancy, the statute does not begin to run as against her until majority. *Bucklin* v. *Bucklin*, 242.

2. Where a sheriff, acting under numerous attachments against the same debtor, makes successive collections and sales, the statute of limitations does not begin to run against one of the attaching creditors the moment the sheriff has collected enough to satisfy the first process. The fund so received may be regarded as single and entire, and it may be regarded as the right and duty of the sheriff, in such cases, to retain the fund until the whole is collected, and conflicting claims of priority are determined. *Davy* v. *Field*, 490.

EXECUTORS AND ADMINISTRATORS, 2.

MARRIAGE.

EVIDENCE, 17.

MERGER.

1. An assignment of a decree of foreclosure to the grantee of the equity of redemption will not operate as a merger, if the intent that it shall not, be expressed therein. *Binsse* v. *Paige*, 138.

2. A conveyance of the equity of redemption in land, to the mortgagee thereof, after he has transferred the mortgage held by him to a third person, as collateral security for payment of a debt, does not merge the mortgage. *Campbell* v. *Vedder*, 295.

MILITIA.

OFFICER.

MINISTERIAL ACT.

DISTRICT COURT, 3.

MONEY RECEIVED.

Where one receives the money of another, and has not the right conscientiously to retain it, the law implies privity, and a promise to repay. *Causidiere* v. *Beers*, 333.

GAMING.

MORTGAGE.

1. Where the rights of creditors do not interfere, a father may make a voluntary provision for his child; and a mortgage to a trustee for this purpose is deemed an executed contract, which is as valid, against his heirs, as a transfer for full pecuniary consideration would be. *Bucklin* v. *Bucklin*, 242.

2. Such provision may be made by means of a mortgage, because that is an executed conditional transfer of the real estate mortgaged, a suit for foreclosure not being an action to enforce a contract but an equitable proceeding to cut off the right to redeem. *Ib.*

3. A mortgage upon real property, executed to the mortgagee in trust to collect and apply the principal and interest, is a trust in personal property; and if the trust is perfectly defined, so as not to rest in the discretion of the trustee, his executor may maintain an action for the foreclosure of the mortgage. *Bunn* v. *Vaughan*, 253.

4. In such an action a pass book kept by the deceased trustee, containing entries of payments of interest, may be admitted in evidence. *Ib.*

5. A mortgage, though without the word "appurtenances" or its equivalent, covering land on which there is a mill worked by water-power, brought by a water-course over adjoining lands, passes the mortgagor's right in the mill and water-power. *Babcock* v. *Utter*, 27.

6. A bond and mortgage given to a building association is not usurious because it requires the payment of interest on the whole principal, and also the monthly reduction of the principal by the payment of installments, which installments are to be made a fund to be divided among the members of the association. *City Building & Loan Co.* v. *Futty*, 347.

7. A purchaser or mortgagee of land cannot avoid a prior recorded mortgage, on the ground that an

assignment of such mortgage was unrecorded. *Campbell* v. *Vedder*, 295.
8. A conveyance expressed to be subject to a mortgage, but without any stipulation that the grantees shall pay it, leaves the grantor primarily liable for a deficiency. *Binsse* v. *Paige*, 138.
9. The facts that the mortgagee, on assigning a decree of foreclosure which he has obtained, covenants with the assignee that the decree shall be paid, and the assignee accepts the assignment for the express purpose of applying any surplus that shall remain after a sale, to pay the assignor's indebtedness, does not modify the primary liability of the mortgagor in case of a deficiency. *Ib.*

MOTION.

NEW TRIAL, 1; NEW YORK (City of), 1.

MUNICIPAL CORPORATION.

1. A contractor employed for the making of a local improvement, the expense of which, under the charter, must be assessed, not upon the city at large, but only on the property benefited, cannot maintain an action for his compensation, against the municipal corporation, directly on the contract, to recover a judgment which shall be a charge upon the general resources of the city. If, however, the council or officers of the city, having power to raise the necessary funds by assessment, neglect to do so, the action will lie upon the ground of negligence. *Baldwin* v. *City of Oswego*, 62.
2. Under a charter requiring that the expenses of local improvements be assessed upon the real estate benefited, and that such improvements must be petitioned for, or consented to, by a majority of the persons whose names appear upon the assessment roll, it is competent for the owners of a part of the lands benefited to petition for the improvement, and consent that the whole expense be assessed on their lands; and an assessment made accordingly will be valid. *Ib.*
3. The charter of Oswego (*L.* 1848, p. 170, c. 116), forbids the common council to create any obligation whatever on the part of the city which should not be payable within the year, and could not be discharged from the income of the year; and forbids them to make appropriations for expenses, not especially provided for, beyond a certain limit.—*Held*, that these provisions did not restrict the corporation from making expenditures for local improvements, to be reimbursed by assessments on the property benefited, nor from making a contract for the construction of such improvements, which, by its terms, was not payable within the year. *Baldwin* v. *City of Oswego*, 62.
NEW YORK (CITY OF), 1.

NEGLIGENCE.

1. An error of judgment, in stepping upon a railroad track, in an emergency, if the proof is not clear as to the elements of time and space on which such judgment was based, should not be held negligence as matter of law, but the question should be left to the jury. *Bernhard* v. *Rensselaer & Saratoga R. R. Co.*, 131.
2. Even where it is apparent from the evidence that the collision was not caused by the negligence of defendants, yet if the evidence is conflicting on the question whether the injury was not augmented by their negligence, a verdict for plaintiff should not be set aside. *Ib.*

OFFICER; RAILROAD COMPANY, 5, 6, 7, 9; TRIAL, 1.

NEW TRIAL.

1. On a motion for a new trial on the ground of newly discovered evidence, there must be an affidavit of the witnesses who will give the new evidence, stating that they are ready to swear to the facts. *Adams* v. *Bush*, 7.
2. Where the evidence given in support of a defense is wholly insufficient, a new trial will not be

granted for the errors in admission of evidence offered merely to rebut or avoid such defense. *Bronson* v. *Tuthill*, 206.

3. On reversing a judgment for error, and ordering a new trial, the court are not authorized to make it a condition that testimony already taken may be read in evidence upon the new trial. The new trial being a matter of right, the party is entitled to it without qualification. *Bruce* v. *Davenport*, 233.
4. On reversing a judgment, a new trial will not be ordered, if no possible proof, under the issue, can entitle respondent to judgment. *Burkhardt* v. *McClellan*, 263.

NEW YORK (CITY OF).

1. Under the act of 1859 (*L.* 1859, p. 1127, c. 489, § 5),—allowing the comptroller of the city of New York to vacate judgments against the city obtained by collusion or founded in fraud, and notwithstanding the act of 1863, p. 409, c. 237, giving the exclusive right to the corporation counsel to appear for the city,—the supreme court have power to grant such a motion, made, on behalf of the comptroller, by counsel (other than the corporation counsel) employed by him under direction of the common council. *Baldwin* v. *Mayor, &c. of New York*, 75.
2. An order of the court at general term, affirming an order vacating a judgment on such a motion, is in the discretion of that court, and cannot be reviewed here. *Ib.*

NONSUIT.

NEGLIGENCE; RAILROAD COMPANIES, 6; TRIAL, 1–3.

NOTICE.

SERVICE AND PROOF, 2.

NUISANCE.

HIGHWAYS, 1.

OFFICER.

The commanding officer of a regiment may be held liable in damages for injury caused to a person in a crowd of spectators by a musket ball fired by one of the men under his command during a parade or drill, the order to fire not being required by his public duty, and he not being proved to have taken sufficient care to see that his intention that nothing but blank cartridges should be fired should be effectually complied with by every man. *Castle* v. *Duryee*, 327.

DISTRICT COURT, 3.

ORDERS.

APPEAL, 1, 2; SUPPLEMENTARY PROCEEDINGS, 2.

PARENT AND CHILD.

MORTGAGE, 1.

PARTIES.

One to whom a contract for payment of money is assigned, in trust for one who had made advances to the assignor, may sue thereon, as trustee of an express trust, under section 113 of the Code. *Cummins* v. *Barkalow*, 479.

FORMER ADJUDICATION; INSURANCE, 4; JUDGMENT, 4, 5; PARTNERSHIP, 2.

PARTNERSHIP.

1. W. bought all the interest of M. in the property of the firm of R. & M., and then formed a partnership with R., agreeing to put in all the property he received from M. *Held*, that a bank deposit in the name of R. & M., of which both parties were ignorant at the time, became the partnership property of the new firm W. & R. *Cram* v. *Union Bank*, 461.
2. When one copartner sells, in his own name, partnership property, with warranty, to one who does not know that it is not his individual property, an action may be maintained against him, for a breach of the warranty, without joining the other copartner. *Cookingham* v. *Lasher*, 436.

BILL OF SALE; EXECUTION, 3.

PARTY WALL.

Under an agreement between owners of adjoining lots, that one may build a wall upon the boundary line, partly on each lot, and that the other and his assigns shall pay a portion of its value, whenever it shall be used by them as a party wall, the grantee of the lot of the builder may recover from the grantee of the other lot, whenever the latter makes use of the wall as a party wall. Under such an agreement the payment is to be deemed due to the one whose property is taken and used, although the agreement and the deeds may not explicitly direct the payment to be made to him. *Brown* v. *Ponts*, 227.

PAYMENT.

Where a payment is made, even by judgment of the court, without directing its application as between several securities, the court, in subsequently determining the application, should do so upon equitable principles, and is not bound to apply the payment to the elder security. *Campbell* v. *Vedder*, 295.

EXECUTORS AND ADMINISTRATORS, 4.

PLEADING.

In an action against an indorser of negotiable paper, the complaint must state the facts necessary to charge him as such; and an averment of demand and notice is not dispensed with by giving a copy of the instrument and alleging the sum due, in the short form allowed by section 162 of the Code of Procedure, for pleading instruments for the payment of money only. *Conkling* v. *Gandall*, 423.

AUTREFOIS ACQUIT; INDICTMENT.

PLEDGE.

1. A creditor made an accommodation note for the benefit of his debtor, and the debtor pledged it before maturity with a third person as security for a trifling loan. After maturity the pledgee recovered judgment upon it against the maker, by default. The debtor then induced the present defendant to reimburse the pledgee the amount of his loan and costs and interest, and to take an assignment of the whole judgment in part payment for property which the defendant thereupon transferred to the debtor. *Held*, that since the plaintiff in the judgment was only a pledgee and had been repaid, and since the debtor himself could not enforce the judgment against the maker of the note, the present defendant as assignee stood in no better position, and could only enforce the judgment to the extent of the sum advanced to reimburse the pledgee. *Blydenburgh* v. *Thayer*, 156.
2. The plaintiff was not estopped by his omission to set up his defense in the action on the note. *Ib.*

POWERS.

The will directed the executors to operate certain factories, which constituted a part of the residuum devised to them in trust, during the limitation, or so long within that period as in their discretion could be done without injury to the interests of the estate. *Held*, that this did not imply a power to sell, before the expiration of the period limited, but only gave a discretion to suspend business. *Downing* v. *Marshall*, 525.

TRUSTS AND TRUSTEES; WILL, 2.

PRECEPT.

SUPPLEMENTARY PROCEEDINGS, 2.

PRINCIPAL AND AGENT.

BROKER; INSURANCE, 2.

PRISONERS.

1. The suspension of civil rights declared by 2 *R. S.* 701, § 19, to be the effect of a sentence to State prison, does not give the convict any immunity from actions, nor suspend the rights of others. *Davis* v. *Duffie*, 486.
2. The statute allowing such prisoners to be proceeded against as absent debtors, is not exclusive of

the ordinary remedy by action. *Ib.*

PROBATE.

WILL, 1.

PROCESS.

ESCAPE; SERVICE AND PROOF, 1.

PROMISE OF MARRIAGE.

EVIDENCE, 18.

PROTEST.

BILLS, NOTES AND CHECKS, 4.

QUESTIONS OF LAW AND FACT.

The question which of two instruments, on the same subject, but not referring to each other, one being undated, was first executed, is a question of fact. *Coons* v. *Chambers*, 439.

TRIAL, 1.

QUESTION OF TITLE.

JUSTICE'S COURT, 2.

RAILROAD COMPANIES.

1. A contract for the operation by one railroad company, of a road owned by another, for the mutual benefit of both, provided that one was to furnish the road, and the other the rolling stock and motive power, and that uniform rates of tolls and fares should be fixed annually by agreement, and the latter company were to pay the former two-thirds of the receipts, ..."such additional charges by way of discrimination as should be made for short distances for motive power, not to be included in the term receipts."

Held, 1. That the rates of tolls and fares contemplated were to be uniform in the sense of not fluctuating, but not necessarily uniform in the sense of proportion to the distance of transportation.

2. That the additional discriminative charges, contemplated by the exception, were only such as should be imposed by the company furnishing the motive power, for that power, for short distances, and in addition to the discriminative charges contained in the table of uniform rates. *The Blossburgh & Corning R. R. Co.* v. *The Tioga R. R. Co.*, 149.

2. The indebtedness of contractors to laborers, for which a railroad company may be held liable, by notice under section 12 of the general railroad law (*L.* 1850, p. 211, c. 140),—which gives laborers a remedy against the company for demands on contractors,—is that only which accrues from the personal labor of the claimant (perhaps including that to which by law he is entitled, such as that of a minor child), with implements used by him, for which no extra charge is ordinarily made. *Atcherson* v. *Troy & Boston R. R. Co.*, 13.

3. A laborer employing his own teams and an assistant, under an agreement therefor with the contractors, cannot recover against the company for the services of the teams or the assistant; nor can he recover even for his own personal services, unless, perhaps, where his agreement for his own services was separate. *Ib.*

4. If the laborer has so dealt with the contractor that any portion of an entire demand is not within the statute, then his remedy is against his employers upon the contract alone. *Ib.*

5. In an action against a railroad company, by a passenger injured in alighting from a train, the fact that the name of the station was not announced, and that the stop was very brief, and similar circumstances,—considered, in determining whether the passenger was negligent in the manner of alighting. *Dickens* v. *N. Y. Central R. R. Co.*, 504.

6. Plaintiff, who lived within a few rods of the railroad, stopped his team upon the track, while driving across it, and in consequence of his thus stopping without looking out for the train, which he might have seen, before reaching the track, if he had taken due care, was run over. *Held*, a clear case of contributory negligence, and

that it was the duty of the judge on proof of these facts to grant a nonsuit or direct a verdict for defendants. *Brooks* v. *Buffalo & Niagara Falls R. R. Co.*, 212.

7. It is well settled that a railroad company is bound to manage their road and machinery with the utmost care and vigilance; and that the freedom from negligence which is required of a plaintiff involves only that ordinary prudence and attention which sensible men are accustomed to give in similar cases. *Cook* v. *N. N. Central R. R. Co.*, 432.

8. The inconvenience to a railroad company, from goods being left in their freight cars standing in the public highway, during the unreasonable delay of the consignee to remove the goods, constitutes only a claim in the nature of demurrage; and the company have no lien on the goods for the payment thereof. *Crommelin* v. *N. Y. & Harlem R. R. Co.*, 472.

9. The driver or brakeman of a horse car is acting in the line of his duty in assisting the young and infirm on and off the car; and the company are liable to a passenger the driver was so assisting, for injury caused to him, before he ever got on the car, by the driver's negligence in not stopping the car. *Drew* v. *Sixth Ave. R. R. Co.*, 556.

NEGLIGENCE, 1.

RAPE.

EVIDENCE, 25, 27.

RECEIVERS.

The rule that the title of a receiver dates only from the filing of the order of his appointment, does not apply to a chose in action. The filing of a bill to set aside the debtor's assignment, if followed by the appointment of a receiver and a decree granting the relief asked for, creates a lien on all the choses in action held by the assignee, which is not liable to be defeated by a cross judgment recovered by the debtor in such chose in action, against the assignor. *Clark* v. *Brockway*, 351.

JUDGMENT, 2.

RECORDING DEEDS.

The words "subsequent purchaser," in the provision of 1 *R. S.* 756; § 1,—making unrecorded conveyances void as against subsequent purchasers, &c.,—mean a purchaser of the estate embraced in the unrecorded conveyance, or of some interest therein. *Campbell* v. *Vedder*, 295.

MORTGAGE, 7.

REFEREE.

APPEAL, 7; HIGHWAY, 2.

REFORMATION OF CONTRACT.

1. The cause of action for the reformation of a contract on account of fraud or mutual mistake, is assignable, and passes by an assignment of the contract. *Bentley* v. *Smith*, 126.

2. The rule that the general conclusion of a judge or referee may be construed as involving a finding upon all the material questions, though such finding be not expressed in terms, applied in such an action, where the finding was that the vendor made the alleged representations, and the assignee relied on them, without any distinct finding of fraud in the original contract and of mistake in the assignment. *Ib.*

ROBBERY.

1. It appeared that just before the alleged robbery, D. had, on his person, a watch, money, &c.; that he became intoxicated; was beaten and bruised, and remained insensible for some time; and, when he came to himself, found his money, &c., gone, and one of his pockets turned inside out. *Held*, sufficient to show the taking of personal property from D. against his will, notwithstanding his voluntary intoxication; and that such taking was accompanied by violence to his person. *Bloomer* v. *People*, 146.

2. Such proof is sufficient to establish the *corpus delicti* of robbery, on an indictment under 2 *R. S.* 677, § 55. *Ib.*

3. In such a case, evidence that the prisoner had avowed an intention to rob D.; that he had used violence towards D. on the night of the robbery: and that part of the stolen property was seen in his possession a few hours after the robbery;—*Held*, sufficient to submit the question of prisoner's guilt to the jury. *Ib.*

SALE.

1. On a sale of merchandise to be delivered in New York, at a specified price, on a credit of thirty days, and to be subject to inspection in Pensacola, whither it was destined by the buyer;—*Held*, that the agreement to pay and the provision for inspection were independent. *Delafield* v. *De Grauw*, 500.
2. Facts on which defendants in an action for the price of goods were held merely to have acted on behalf of a third person in shipping the goods. *Downs* v. *Sprague*, 550.
3. A sale of all the timber of a specified description growing or being upon the seller's land, with the right to enter and occupy for a term of years, for the purpose of cutting and carrying away such timber and for the purpose of carrying on the business of lumbering and manufacturing timber on the land, is a sale only of such timber as the purchaser actually removes within the period fixed. *Boisaubin* v. *Reed*, 161.
4. After the expiration of the period, it is a trespass for the seller to enter and remove timber previously cut; and if insolvent, he may be enjoined from so doing. *Ib.*
5. Under the provision of the statute of frauds,—declaring that a sale of personal property for fifty dollars, or more, without writing or part payment, is void, unless the buyer shall accept and receive part of the goods,—there must be a delivery by the seller, with intent to vest the right of possession in the buyer, as well as an actual acceptance by the latter, with the intent of taking possession as owner. *Brand* v. *Focht*, 185.
6. If the buyer obtains a bill of lading from the seller, without any intention on the part of the seller to deliver it, and insists on retaining possession, against the remonstrance of the seller, he cannot avail himself of it to make out his title. *Ib.*
7. A memorandum of a contract of sale, to bind the seller under the statute of frauds, must show with sufficient certainty who are the contracting parties, and which is the seller. *Calkins* v. *Falk*, 291.
8. It will not be presumed, in the absence of evidence, that two such names as Falk and Falleck, were intended of the same person. *Ib.*
9. If merchandise, sold subject to government inspection, is delivered so as to pass title, and a part is rejected by the inspector, the buyer must return the part rejected, or give notice to the seller. If he neglects to do so, and the part rejected is lost to the seller, the buyer cannot reduce a recovery of the contract price by proving the failure to pass inspection. *Delafield* v. *De Grauw*, 500.

PARTNERSHIP, 2.

SATISFACTION.

EXECUTORS AND ADMINISTRATORS, 4.

SERVICES.

BROKER, 5; CONTRACT, 1: EVIDENCE, 22, 23.

SERVICE (AND PROOF OF).

1. Service of process upon a convict in the State prison is valid, and gives the court jurisdiction. *Davis* v. *Duffie*, 486.
2. A notice of justification of sureties, served by mail, must allow double time, unless an order enlarging the time be procured. It is no excuse for short notice that double time did not remain after notice of exception to the sureties was received. *Dresser* v. *Brooks*, 555.

SET-OFF.

A debtor made an assignment for benefit of creditors, and defendant gave his notes to the assignees for

a debt he owed to the debtor. Subsequently a creditor of the debtor had the assignment set aside and a receiver of the assets appointed. Defendant then sued the debtor and receiver on a claim he held against the former, and recovered judgment directing the receiver to pay such claim.

Held, in an action brought by the receiver on the notes given by the defendant to the assignees, that the defendant was not entitled to have the judgment recovered by him set off. *Clark* v. *Brockway*, 351.

SHERIFF.

1. It is no defense to an action against a sheriff for not returning an execution, to show that it was returned a few days after the expiration of the sixty days. *Brookfield* v. *Remsen*, 210.
2. In an action against a sheriff for a false return, it is no defense that the judgment debtor against whom the execution was issued, held the property, which had been levied on, by an assignment fraudulent as to one of the assignors, if another of them had the right to convey. *Colwell* v. *Blackley*, 400.

LIMITATIONS, 2.

STATUTE.

A statute, remedial in its nature, and intended to legitimate the issue of marriages otherwise void, may properly be applied retrospectively. *Brower* v. *Bowers*, 214.

DISTRICT COURT, 1.

STATUTE OF FRAUDS.

SALE, 5; VENDOR AND PURCHASER, 3.

STIPULATION.

A stipulation in a suit, that certain claims arising in it shall be referred to a master, if it is not enforced by one party, does not preclude the other from having the same claims allowed in a subsequent suit. *Binsse* v. *Paige*, 138.

CONTRACTS, 6; EXECUTION, 2; WAIVER.

SUPPLEMENTARY PROCEEDINGS.

1. In proceedings supplementary to execution, if the judge finds the defendant able to pay the judgment, and orders him to pay the same within a time specified, and also to pay an amount of costs stated, the defendant, if he fails to comply with such order, may be proceeded against as for contempt, and may be imprisoned until such order be complied with. *Brush* v. *Lee*, 338.
2. It is not necessary in such case that the proceedings for contempt be instituted by attachment and interrogatories. Disobedience of an order for the payment of money may be immediately punished by a precept for the imprisonment of the defendant. But if an order to show cause be taken, the defendant is not entitled to object to that mode of proceeding. *Ib.*
3. On the return of such an order to show cause, he cannot insist on interrogatories, as in the case of an attachment. *Ib.*
4. The power to punish the defendant for contempt in such a case is not affected by the fact that the judgment on which the proceedings supplementary to execution were founded, was a judgment merely for costs. *Ib.*

SURETIES.

FRAUD, 11; UNDERTAKING, 1.

TAXATION.

FOREIGN CORPORATIONS; INSURANCE, 5, 6.

TENDER.

CONTRACT, 6.

TIMBER.

SALE, 1.

TOLLS.

RAILROAD COMPANY, 1.

TRADEMARKS.

The rule that a manufacturer, or

merchant for whom goods are manufactured, has a right to distinguish the goods that he manufactures or sells, by a peculiar mark or device, in order that they may be known as his in the market, and that he may thus secure the profits that their superior repute, as his, may be the means of gaining. and that this right will be protected by injunction,— applies to the use of such a compounded term as "Cocoaine," to designate a hair-wash in which cocoanut oil is a principal ingredient. And the subsequent adoption, by a rival dealer, of the word "Cocoïne," to designate a similar compound put up by him, is an infringement against which the courts will interpose by injunction. *Burnett* v. *Phalon*, 267.

TRESPASS.

EVIDENCE, 28; EXECUTION, 3; OFFICER; SALE, 4.

TRIAL.

1. In cases of negligence, where there are inferences to be drawn from the proof, which are not certain and incontrovertible, it is not proper to direct a verdict or nonsuit, but the question is for the jury. Thus where it is necessary to determine what a man of ordinary care and prudence would be likely to do in the emergency proven, this, involving, as it generally does, more or less of conjecture, can only be settled by a jury. *Bernhard* v. *Rensselaer & Saratoga R. R. Co.*, 131.
2. To justify a nonsuit in an action for damages caused by negligence, either the question whether defendants were guilty of negligence, or the question whether the injured person was free from negligence, must be answered, by the evidence, against the plaintiff, so clearly that there is no room for doubt. All disputed facts must be conceded to the plaintiff; and the court of appeals will not sustain such a nonsuit on the ground that evidence in favor of the plaintiff, which would have justified a verdict, was outweighed by conflicting evidence. *Cook* v. *N. Y. Central R. R. Co.*, 432.
3. The court is bound to decide the question of negligence, only where the facts are undisputed, and the inference of negligence is clear. *Dickens* v. *N. Y. Central R. R. Co.*, 504.
4. Under the general issue, in an action for breach of promise, in offering evidence in mitigation of damages, the defendant is not bound to declare that he offers it for that purpose. If the evidence is competent for any purpose, it is error to reject it, although incompetent for other purposes. *Button* v. *McCauley*, 282.
5. Two witnesses contradicting each other as to whether one of them had given certain notice to the other, it is not error to charge the jury that the one could not have truly sworn he gave the notice, unless he recollected giving it; and that, if he did not recollect it, he had committed perjury. *Carroll* v. *Charter Oak Ins. Co.*, 316.
6. Upon a indictment containing several counts relating to the same transaction, one of which charged an attempt to commit the offense, the commission of which was charged in the others, — *Held*, that a verdict "guilty *of the offense charged in the indictment*," was a sufficient general verdict to support a conviction of the highest grade. *Conkey* v. *People*, 418.

EVIDENCE, 12; EXCEPTION, 1, 2; FRAUD, 5.

TRUSTS AND TRUSTEES.

1. Where executors have not the legal title, but only a power in trust, if the trust is declared void, there is no necessity of a conveyance to the heirs. *Downing* v. *Marshall*, 525.
2. But if the power is void only as to beneficiaries entitled to a small share of the proceeds, it may be upheld as to the entire property, and the heir will be entitled to take such share of the proceeds, on the exercise of the power. *Ib.*
3. On the death of a mortgagee holding in trust for a third person, the trust does not *ipso facto* fall on the court of chancery.

Such a trust is a trust of personalty, and is not governed by 1 *R. S.* 730, § 68, which applies only to realty. *Bucklin* v. *Bucklin*, 242.
4. A trustee cannot be allowed a counsel fee for his own services as a lawyer, in addition to his expenses and commissions. *Binsse* v. *Paige*, 138.
5. A trustee will not be permitted to make profit for himself out of the trust property, and it is his duty to protect it to the best of his ability from sacrifice on sales which would overreach and destroy his title; and purchases by a trustee in such cases accrue to the benefit of the trust fund. *Colburn* v. *Morton*, 378.
6. This principle applies without reference to the question of the fairness or unfairness of the transaction. *Ib.*
7. The rule that a trustee cannot purchase the trust property, is to be applied, not only in case of valid trusts, but as well on settlements and accountings with trustees or assignees in cases of fraudulent assignments when adjudged void. *Ib.*
8. If such trustees hold under the assignment, they are trustees of an express trust to be executed according to the directions of the instrument; but if the assignment be avoided by creditors, the assignees are the trustees for the creditors under an equitable or constructive trust. *Ib.*
9. The assigned property purchased in by the assignees still belongs to the trust fund, subject only to the assignees' right of indemnity for their advance on the purchase. *Ib.*

MORTGAGE, 3.

UNDERTAKING.

1. In an action against the sureties in an undertaking purporting to have been given to procure the discharge of an attachment issued as a provisional remedy under the Code, it is not competent to show, in defense, that no attachment was in fact issued; nor is it competent to prove that the sureties were induced to execute the undertaking, by fraud of their principal, unless the plaintiff be connected with the fraud. *Coleman* v. *Bean*, 394.
2. It is not essential to the validity of such an undertaking that an attachment shall actually be issued, or that the undertaking be delivered to the court or an officer. Giving an undertaking which recites the issue of an attachment when none has been issued, is conclusive evidence of a waiver of an attachment. *Ib.*

FRAUD, 11.

VARIANCE.

The decision in Catlin *v.* Gunter, 11 *N. Y.* (1 *Kern.*) 368, as to variance in cases of usury,—reaffirmed *Duel* v. *Spence*, 559.

INDICTMENT, 2.

VENDOR AND PURCHASER.

1. Where land is conveyed by metes and bounds, with covenants, and a building and fence, not specified in the deed, encroach on the adjoining lot, the eviction of the grantee from the part of the building and enclosure so encroaching is no defense to his liability for the purchase money. *Burke* v. *Nichols*, 260.
2. Where a purchaser of land in possession surrenders his contract, and procures a deed to be made by his vendor, to a third person, in consideration of the latter advancing unpaid purchase money necessary to procure the conveyance, and promising, orally, to give him a written obligation to convey to him on the repayment of the advance, &c., a court of equity will enforce performance of the parol promise. *Dodge* v. *Wellman*, 513.
3. This will be done upon the principle that a party will not be permitted to insist on the statute of frauds, to protect him in the enjoyment of advantages procured from another, in faith of an oral agreement on which the latter has acted, and in faith whereof he has placed himself in a situation in which he must suffer wrong and injustice. *Ib.*
4. Not only is the purchaser entitled

to enforce such promise, but the grantee in the deed cannot recover possession meanwhile, if the original contract entitled the purchaser to remain in possession, and it does not appear that, in assuming the place of the vendor, the grantee stipulated for any change in this respect; or if the parol agreement provided that he should have interest annually on the advance; for this imports that the purchaser should have the rents and profits. *Ib.*

5. Fraud, by which a vendor in an executory contract for the sale of land, had acquired the legal title thereto, does not give the purchaser in such a contract a right of action against him, if it does not appear that the person defrauded made any objection, upon reasonable opportunity, after full knowledge of the facts. A fraud is a cause of complaint to the person only upon whom it was committed. *Comstock* v. *Ames*, 411.

VESTED ESTATE.

WILL, 3.

WAGER.

CONTRACT, 4.

WAIVER.

The authorities sustain the general doctrine, that a waiver of a stipulation in a contract may be shown by parol, notwithstanding the contract requires a writing. *Carroll* v. *Charter Oak Ins. Co.*, 316.

INSURANCE, 1; JUDGMENT, 1

WATERCOURSE.

MORTGAGE, 5.

WILL.

1. A beneficial provision in a will, in favor of the subscribing witnesses, is not rendered void by 2 *R. S* 65, § 50, even where such witness was examined as such on the probate, if his examination was unnecessary,—*e. g.*, where he was a non-resident, and the will was sufficiently proved by the testimony of the other witnesses. *Cornwell* v. *Wooley*, 441.

2. A power of sale in a will is not revoked by a different disposition of the estate, made by a codicil, unless there is some inconsistency between the exercise of the power, and some part of the codicil. *Conover* v. *Hoffman*, 429.

3. The terms of the will gave all testator's estate to his wife for her life, after her death, a remainder to testator's children who might then be living, share and share alike, the share of one son, named, to be held and invested by testator's executor, during the lifetime of said son, and the income paid over to him, &c.

Held, that the latter clause did not give the son a vested interest on testator's death; but the son, like the other children, took only in case he survived at the widow's death. *Carmichael* v. *Carmichael*, 309.

4. In the will of a testator, leaving nephews and grand nephews, a clause giving legacies to each of his nephews, excepting one person named, who, in fact, was a grand nephew, is to be construed, when consistent with other provisions of the will, as including grand nephews within the term nephews. *Brower* v. *Bowers*, 214.

5. In determining what part of a testator's property is to be resorted to for payment of debts, a plain intention, gathered from the will, that certain personal property shall be treated as real, must be regarded as effecting a conversion thereof, and specific legacies must be resorted to before chattels so converted are applied. *Downing* v. *Marshall*, 525.

6. The testator, after certain specific bequests, gave the residue of his estate, both real and personal, to his executors in trust, and directed them to continue his manufacturing establishments in operation during the lives of certain beneficiaries, and distribute the income, and, on the termination of such lives, sell the same and distribute the proceeds, in execution of the trusts. *Held*, 1. That machinery in the factory which would otherwise have been regarded as per-

sonal assets under the Revised Statutes, could not be applied to the payment of debts, other than those connected with the factories, until after the specific legacies had been exhausted. 2. That liabilities arising from testator's contracts relating to the machinery should be satisfied from the income of the trust property. *Ib.*

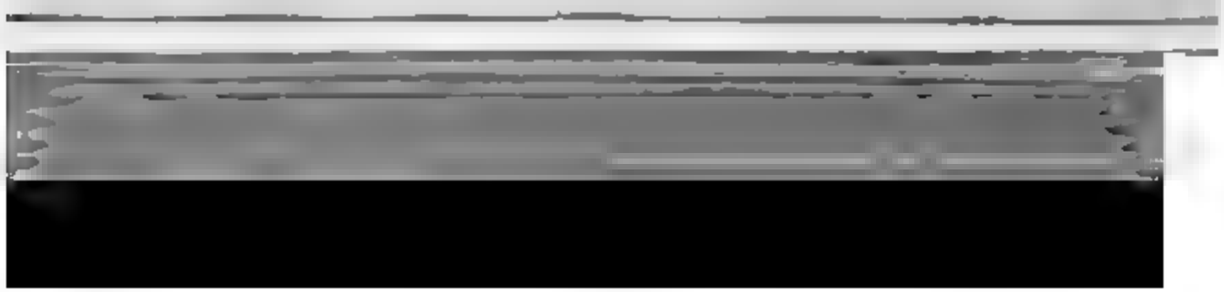
7. Under such a will, the executors should keep their accounts with the trust property, as trustees, distinct from their accounts as executors, and in their action to obtain a construction of the will and direction how to administer it, the court will not give directions as to matters left to their discretion as trustees. *Ib.*

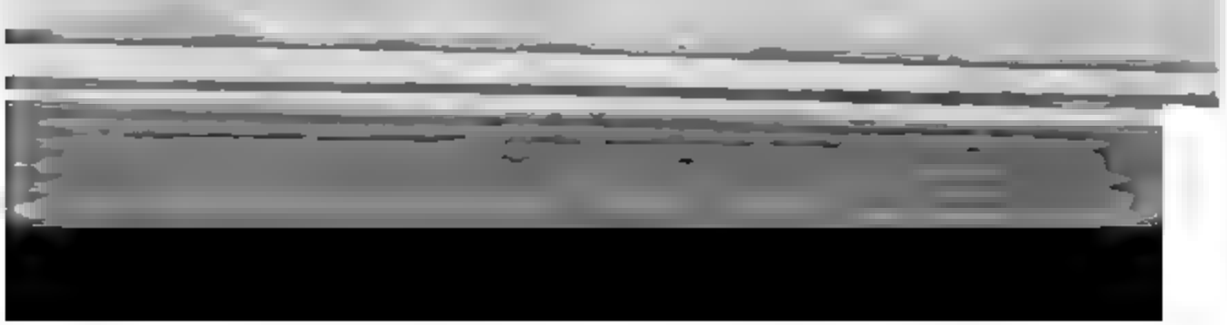
POWERS.

WITNESS.

Where, on cross-examination, a party takes the testimony of the witness to new and collateral matter, not pertinent to the issue, he is not at liberty to give evidence to contradict the witness in this respect. *Crounse* v. *Fitch*, 475.

EVIDENCE, 3; TRIAL, 5; WILL, 1.





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